92-674

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1992

Edgar H.W. Lum,

Petitioner,

vs.

City and County of Honolulu,

Respondent

On Petition For Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as a matter of law, Petitioner should have been reinstated to his job under Hawaii Revised Statute 76-46?
2. Whether Petitioner was fired in retaliation for filing a Title 7 claim and should therefore be reinstated to his job?
3. Whether Petitioner should be reinstated to his job for violation of his due process rights?
4. Whether Petitioner got a fair trial?

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Petitioner Edgar H.W. Lum respectfully prays that a writ of certiorari issue to review the decision of the District Court for Hawaii issued on Aug. 29, 1990 and the decision of the U.S. Court of Appeals for the Ninth Circuit issued on June 15, 1992.

I.

CITATION TO OPINION BELOW

The Hawaii District Court decision appears in Appendix A

The decision of the Ninth Circuit appears in Appendix B

II.

JURISDICTION

This action was brought to redress the deprivation of rights secured to Lum in his employment by Title 7 of the Civil Rights Act of 1964, 42 U.S.C. #1983, and the Fifth and Fourteenth Amendment to the U.S. Constitution. The district court had subject matter jurisdiction over the federal claims by virtue of 28 U.S.C. ##1331, 1337, and 1343, and 42 U.S. C. #2000e-5(f)(3) and it had pendent jurisdic-

tion over the state claim.

An appeal to the District Court's decision was filed on Sept. 24, 1990. The decision of the Ninth Circuit was filed on March 17, 1992 and amended on June 15, 1992 when my petition for rehearing was denied. This petition for a writ of certiorari was filed within 90 days of that date as provided under 28 U.S.C. #2101(c) and Rule 13(1) of the Rules of the U.S. Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. #1254(1).

III.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. HRS 76-46 and Civil Service Rule 10.3c of the City and County of Honolulu which state that a regular employee cannot be fired unless he is given at least ten days a written notice setting forth the specific reasons for the dismissal before the effective date of the termination
2. HRS 76-41 and Civil Service Rule 6 which state that permanent employees shall have his work performance evaluated at least

once every 12 months and the employer shall inform employees in writing whenever their performance is substandard. An employee with continued substandard performance for a period of three months may be denied a pay increment.

3. 42 U.S.C., Section 2000e-3 prohibits retaliatory discharge for filing a Title 7 claim

4. The fifth and fourteenth amendments to the U.S. Constitution which provides for due process rights

IV

STATEMENT OF THE CASE

A. THE FACTS

1. On July 17, 1980, Lum, a permanent City employ filed this suit claiming that his dismissal was the result of race discrimination, retaliation for filing an EEOC complaint, denial of his due process rights, and a pendent state claim that his dismissal violated Hawaii Civil Service statutes and rules.

2. Lum was a career permanent civil service

employee with about 20 years of service.

3. Prior to coming to the City on a promotion transfer, Lum had no disciplinary action of any kind taken against him for unsatisfactory work performance or excessive use of sick leave.

4. Lum is a certified public accountant passing the examination while working for the City with the highest average score and was honored by the Hawaii Society of CPA'S

5. Lum was employed by the City and County of Honolulu as an Internal Control Analyst II for about 12 years from 3-9-67 to 7-28-79.

6. In 1972-73, Lum received an unsatisfactory annual job performance rating and letters of reprimand notifying him of his unsatisfactory work performance in accordance with HRS 76-41 which was grieved and expunged from the records

7. In all the other years of employment with the City, Lum received satisfactory job performance ratings annually.

8. All of Lum's sick leave application and weekly time sheets were approved by his super-

visor

9. On Nov. 27, 1978, Lum was suspended for ten days without pay for (a) excessive use of sick leave, (b) excessive use of working time to accomplish personal business, and (c) malingering only two months after he filed a workers compensation claim on Sept. 8, 1978

10. Lum received a series of weekly warnings (a total of 5) from the Executive Assistant Carson from 12-21-78 to 2-5-79 who reviewed his time sheets weekly and expressed dissatisfaction with the method of his time sheet keeping. After the first warning, Lum brought it up with his supervisor and was told to ignor the warnings and to continue to keep his time sheets in the same way as in the past. Lum grieved the warnings but the City ruled that they were not disciplinary in nature and not grievable.

11. On May 11, 1979, Lum filed an EEOC compliant and two months later on July 18, 1979 Lum was suspended for ten days without pay and dismissed for (a) excessive use of sick leave,

(b) inability to perform assignments, (c) non-production of assigned work and (d) attitude toward your job.

B. PROCEDURAL HISTORY

1. The U.S. District Court for Hawaii held that the City did not violate HRS 76-46; the City did not fire Lum in retaliation for filing a Title 7 claim but had proper cause; and the the City violated Lum's due process rights but since Lum would not have prevailed if he had been given a pretermination hearing, Lum was not entitled to reinstatement to his job but awarded Lum $3,000 for the due process violation for mental and emotional distress.

2. Lum thru his new attorney, Evan Shirley, appealed on the violation of HRS 76-46 only on Sept. 24, 1990. The Ninth Circuit vacated the district court's finding on HRS 76-46 but expressed no opinion on this issue saying it was moot since Lum was not entitled to additional relief because both the arbitrator and district court concluded Lum was terminated for good cause and that the result would not

have been different if Lum had received pre-termination notice and a hearing.

3. The Ninth Circuit filed its Order on March 17, 1992 and Lum, Pro Se filed a petition for rehearing on March 30, 1992 and an addendum to the petition on May 26, 1992.

4. On June 15, 1992, the Ninth Circuit issued an amended opinion and the mandate.

5. Lum filed a second petition for rehearing on July 31, 1992 but it was defective so Lum filed a motion to recall the mandate on Aug. 12, 1992.

6. After Lum filed a third petition for rehearing on Sept. 1, 1992, he received an Order from the Ninth Circuit denying the motion to recall the mandate.

V.

REASONS FOR GRANTING THE WRIT

A. HRS 76-46 and Civil Service Rule 10 states that no dismissal of a regular employee shall be effective for any purpose unless at least ten days before the effective date thereof, the employee is given a written statement setting forth the specific reasons upon which the dismissal is based.

The district court ruled that the City

complied with the statute but the Ninth Circuit vacated the ruling and said it was moot. Had the district court ruled correctly, a trial would not have been necessary. Therefore, a summary reversal is warranted on this issue. In Wilson Arlington Co. v. Prudential Ins. Co., 912 F 2d 366 (9th Cir. 1990), the Ninth Circuit reversed a judgement entered after trial because a summary judgement should have been given for the plaintiff.

In Re Appeal of Harper, 52 Haw. 313, 475 P. 2d 53 (Haw. 1970), the Hawaii Supreme Court said ..... the public employer "must bear the consequences of its failure to meet the requirement" of the statue even if there was good cause to terminate no matter of a post-termination hearing finding. Thus under Hawaii law, reinstatement is an absolute right of extreme importance to all Hawaii public employees and must be protected and honored by this court. Lum believes that as a Hawaii resident subject to Hawaii law, he entitled to equal treatment and equal protection under

the constitution as any other Hawaii resident.

Hawaii courts require strict compliance with the law. For example under HRS 521-68(a), the landlord must notify the tenant in writing and give him five business days to pay his rent before he can evict the tenant. Similarly, a public employee must be given ten days written notice prior to the effective date of termination under 76-46. In HARPER, the Hawaii Supreme Court automatically reinstated him because he did not receive the required ten days notice.

The City did not provide Lum the required ten day notice under 76-46 because the City's so-called ten day suspension without pay followed by automatic and certain termination was the equivalent of immediate dismissal. Under Thurston v. Dekle, 531 F 2d 1272 (5th Cir 1976), suspension without pay that automatically results in termination is the functional "equivalent of dismissal."

Lum was dismissed on July 18,1979 when he received the "termination letter", when

his pay stopped, and when he was told to clear his desk and take his things (RT I/10), he was no longer an employee. The City therefore, did not comply with 76-46 since Lum was effectively terminated upon receipt of the termination letter.

The federal courts below and the Hawaii Supreme Court seem to differ in the application of HRS 76-46. On this pendent state claim, Lum prays that this Court will order a summary reversal of the courts ruling below and reinstate Lum to his job with back pay with whatever relief this Court deems appropriate in the circumstances in accordance with the HARPER decision.

B. The Retaliatory Discharge Claim, 42 U.S.C. Section 2000e-3.

The City fired Lum for excessive use of sick leave and unsatisfactory work performance after 12 years of allegedly tolerating his unsatisfactory work performance. Lum was fired two months after he filed an EEOC complaint. Why did it take the City 12 years to fire Lum if his work performance was unsatis-

factory? Lum took only two days sick leave during his last eight months of employment which on its face is not excessive and received satisfactory annual job performance ratings every year. All Lum's weekly time sheets and sick leave applications were approved by his supervisor. His supervisor testified under oath that Lum's work performance was average when compared with the other accountants in the division. Except in 1972-73 when Lum was notified that his performance was not satisfactory which was grieved and expunged from the records, the City did not comply with HRS 76-41 which state in part that an employee must be notified in writing whenever his his performance is unsatisfactory and give him some time to correct it. The City's reasons for firing Lum was pretextual and not supported by the evidence on the whole and since the City did not comply with HRS 76-41, the City should be estopped from alleging unsatisfactory work performance by Lum. Furthermore, Lum testified under oath that his

supervisor told him he was going to be fired for filing an EEOC complaint.

Lum's disciplinary record shows that he only had a ten day suspension without pay in Nov. 1978, two months after he filed a workers compensation claim and was fired in July 1979, only two months after he filed an EEOC claim. It was obvious that Lum was fired in retaliation for filing a Title 7 claim because the punishment was too severe and the City claims that Lum's performance was unsatisfactory for 12 years but didn't fire him until he filed the EEOC claim which was the "straw that broke the camel's back." The City had to fire Lum to prevent him from filing anymore EEOC complaints.

Under Yartzoff v. Thomas, 809 F 2d 1371 (9th Cir 1987), satisfactory job performance rating is evidence of pretext of firing. I had satisfactory JPRs annually. The fact that the City took 12 years to fire me alleging unsatisfactory work performance during this time and the firing came only 2 months after I filed

a Title 7 claim supports my claim also that the City's reason for firing me was pretextual and I was a victim of retaliation. The City's failure to comply with HRS 76-41 and notfy me that my work performance was unsatisfactory before they suspended me in Nov. 1978 and fired me in July 1979 is further evidence that the reason proffered for my dismissal was pretextual.

On the retaliatory discharge claim, Lum prays that this Court will order a summary reversal of the decision of the courts below and reinstate Lum to his job with back pay and interest and damages and whatever relief this Court deems appropriate in the circumstances.

C. The Due Process Claim

The district court found that Lum's due process rights were violated when the City failed to provide Lum with a pretermination hearing so he could tell his side of the story. However, the district court found that Lum was terminated for good cause and that the

results would not have been different if Lum received a pretermination hearing so the court refused to reinstate Lum. The arbitrator came to the same conclusion. Two wrongs do not make a right. Both the arbitrator and district court judge were not impartial. If an impartial person heard my case, I would not have been fired. The law requiring pretermination hearing helps to prevent errors, provides a meaningful time and place for a hearing and allows time to correct the violation before an almost irreversible adverse decision is made which a post termination hearing cannot provide, as in this case for example. A post termination hearing is no hearing. It is common knowledge that the chances of overcoming a dismissal is far far greater at a pretermination hearing than at post termination hearing and the remedy for denial of a pretermination hearing is reinstatement of the fired employee.

Furthermore, it took over ten years to hear my Title 7 claim. Under Cleveland Board of Education v. Loudermill, 470 U.S. at 532,

this is "constitutionally inviolative" on its face because it took too long and the remedy should be reinstatement.

Moreover, the courts in the different circuits seem to differ as to what the remedy is for due process violation. In Hougue v. Clinton, 791 F. 2d 1318, 1326-29 (8th Cir. 1984), the measure of damages is back pay from termination until post termiantion hearing; In McGhee v. Draper, 639 F 2d 639, 646 (10th Cir 1981), reinstatement is the proper remedy if there was mitigating circumstances against termination; In Wellner v. Minnesota State College, 487 F 2d 1953, 1957 (8th Cir 1973), back pay until a hearing is held is the proper remedy for deprivation of property and liberty interest; In Brady v. Gebbie, 259 F 2d 1543 (9th Cir 1988), reinstatement is the proper remedy where the post termination hearing took too long; In Shelly v. State, 539 F 2d 774, reinstatement is the only proper remedy when due process rights are violated and termination too severe a penalty; In Zinermon

v. Burch, 110 S. Ct. 975, 988 n. 19 (1990), termination was the actual injury and reinstatement was the proper remedy for due process violation.

The opinion of the district court as to the damages appears to be in direct conflict with the other circuits and substantially affects a rule of national application in which there is an overriding need for national uniformity.

Besides being denied a pretermination hearing, Lum's due process rights were violated when he did not get a detail list with specific dates of excessive sick leave and unsatisfactory work performances to support the Nov. 1978 suspension and theJuly 1979 dismissal at the time these diciplinary actions were taken; when he was not notified in writing that his work performance was unsatisfactory and given some time to correct it before he was suspended in 1978 and dismissed in 1979 as required in HRS 76-41; when the disciplinary action taken for dismissal was too severe;

when the post termination hearing took too long; and when he was punished two/three times for the same violation (double jeapody in 1978 and 1979). See appendix for petition for re-hearing in the 9th Circuit.

On the due process claim, Lum prays that this Court will order a summary reversal of the lower courts decision and reinstate Lum to his job with back pay and interest and damages and whatever relief this Court deems appropriate in the circumstances

D. Lum Did Not Get A Fair Trial

1. The arbitration decision should not have been admitted at the trial below because the arbitrator was not impartial and the union attorney that represented Lum had a conflict of interest because my superiors were in the same union as me. Who did the attorney represent, Lum or his superiors who fired him?

2. Lum is entitled to a de novo trial below in a Title 7 claim but did not get one when the court below admitted the arbitra-

tor's decision as evidence and gave it great weight. In Aleem v. General Felt Industries Inc., 661 F 2d 135 (9th Cir 1981) Cert. denied 106 S. Ct. 54 (1985), the court said that Title 7 claims are independent actions and the arbitration decision should be given no weight.

3. Both the arbitrator and district court judge were not impartial. In their decisions, they did not say that in the last eight months of my employment, there were no unsatisfactory work performance complaints against me; that my supervisor testified under oath that my work performance was average when compared to the others in the division; that I did not get a detail list with specific dates for excessive sick leave and unsatisfactory work performance to support the Nov. 1978 suspension and the July 1979 dismissal; that I did not receive written notice that my performance was unsatisfactory and that if I did not improve my work performance within three months, further dis-

ciplinary action would be taken against me prior to my 1978 suspension and my 1979 dismissal as required by HRS 76-41.

For twelve years, I received satisfactory annual job performance ratings and my sick leave applications and weekly time sheets were approved. However, after I was fired, to justify my dismissal, the City alleges that they were falsyfying these important government records. How absurd and bizarre. What else are they lying about?

The City's case below at trial was based almost entirely on the Executive Assistant's testimony that my work performance was not satisfactory (he was not an accountant and not qualified to know), hearsay evidence, and unverified and unsubstantiated comments that my work performance was not satisfactory (no expert impartial witness testified).

Two wrongs do not make a right. Gray v. Mississippi, 107 S. Ct. 2045, 2054 (1987).

VI

CONCLUSION

The judicial process is on trial in this

case. This cae is now really about politics in Hawaii and a power far greater than mine and I could not even find a good attorney to stand up to the "old boy network" for fear of retailiation in this unpopular case. As the saying goes "you gotta go along to get along". It's obvious the judgement below is clearly erroneous. I was railroaded and jerked around. As one attorney puts it "Those bastards. They glossed over the record. They going blame each other and support each other." And as one non-attorney summed it up, "things were stacked against you and you were a sacrificial lamb." This is a well known case in Hawaii and hard to cover-up because it is a matter of public record now. These are the kind of cases that give the judicial process a bad name and reputation, and why the public is losing confidence in the judicial system.

As an American citizen, I am entitled to life, liberty, and the pursuit of happiness. We are supposed to be a nation of laws not men. No one is above the law. This is what we teach our children in school.

I suspect that Americans all over the country, not only myself, are fighting for their lives everyday where the powerful are taking advantage and beating up on those without power. As the guardian of justice, this court must step in and balance that power to protect and maintain the moral fiber of this country and the public confidence in the judiciary system.

Wherfore, Petitioner prays that this Court will grant the petion for certiorari and summarily reverse the judgements below adverse to petitioner or grant plenary review to prevent a great injustice.

Dated: Honolulu, Hawaii, Sept. 10, 1992

Respectfully submitted,

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APPENDIX

Decision, Findings of Fact, and Conslusions of Law, District Court of Hawaii 1a

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APPENDIX A

In the United States District Court
For the District of Hawaii

Edgar H.W. Lum, Plaintiff

v. Civ. No. 80-384 ACK

City and County of Honolulu

DECISION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

DECISION

On July 19-20, 1990, this cause came for non-jury trial before this Court. Plaintiff filed this action under Title 7, 42 U.S.C. #1983, the Fifth and Fourteenth Amendments to the U.S. Constitution, and Hawaii Revised Statutes ("HRS") #76-46 based the termination of his employment as an accountant with the City and County of Honolulu.

Plaintiff alleged that he was terminated in retaliation for filing an Equal Employment Opportunity Commission ("EEOC") complaint. Plaintiff claimed his dismissal was the result of Defendant's racial discriminatory practices. Plaintiff's extended career with the City and County was marred by in-

effective work performance, abuse of sick leave privileges, and a poor work attitude. The event which constituted the "last straw" for the City and County concerned Lum's performance of an assignment at the Parks Storeroom. Plaintiff's work on the assignment was inadequate. When given an opportunity to complete the assignment properly Plaintiff failed to follow his supervisor's instructions. Accordingly, Plaintiff was given ten-days notice of his termination.

After extensive hearings and an arbitration proceeding this case finally came to trial before this Court. Based on overwhelming evidence presented in this case this Court finds that Plaintiff's retaliatory discharge claims are not supported. Even assuming Plaintiff made a prima facie case of retaliation, Defendant established legitimate non-retaliatory grounds for discharge which Plaintiff has failed to show were pretextual. As to Plaintiff's procedural due process claims under the Fifth and Fourteenth Amendments to the

U.S. Constitution this Court previously held that the City and County failed to provide Plaintiff with the necessary protection of a pre-termination hearing. Plaintiff is thus entitled to actual damages suffered and attorney's fees incurred resulting form the City and County's failure to provide a pre-termination hearing.

Plaintiff's claim under state law were without merit, however. Plaintiff's punitive damages claim must also be rejected as there is no evidence of malicious behavior on behalf of the City and County. Finally, except as the federal constitutional due process claim, Plaintiff's request for attorneys' fees under 42 U.S.C. #1988 is denied since Plaintiff is not a prevailing party. Accordingly, judgement shall be entered in accordance with the Findings of Fact ("FF") and Conclusions of Law (CL) which follow this decision.

FINDINGS OF FACT

Background

1. If any of the findings of fact

are determined to be conclusions of law, they shall be so treated, nothwithstanding their inclusion here as a finding of fact.

2. Plaintiff Edgar H.W. Lum is a resident of Honolulu, Hawaii

3. Defendant City and County of Honolulu ("City and County") is a municipal corporation of the State of Hawaii existing by and under the Laws of the State of Hawaii; is also a political subdivision thereof; and is an employer.

4. Mr. Lum is a person of Chinese ancestry and race.

5. Mr. Lum is a certified public accountant.

6. Mr. Lum was employed by the City and County as an Internal Control Analyst II from March 9, 1967 to July 28, 1979.

7. During his employment with the City and County of Honolulu Mr. Lum was a member of the Hawaii Government Employees Association, Unit 13 ("HGEA").

8. Mr. Lum's employment was covered by a collective barginiing agreement entered

into between HGEA and the City and County. D 18

Mr. Lum's Work Performance

9. On November 3, 1972, Mr. Carson sent a memorandum to Mr. Lum finding Mr. Lum's report on Inventory of Department of Finance Equipment to be "incomplete" and lack(ing) depth and detail. D's 19. The memorandum concluded: "Edgar, if the material that you gave me to review are samples of the reports that you are turing in to Alex Oka, you are wasting your time, his time in reviewing them, and the City's time because they are paying you to do a job." Id at 2

10. On March 9, 1973, Mr. Hara directed a memorandum to Mr. Oka requesting that "corrective action" be taken against Mr. Lum. D's 20. This request was based on Mr. Lum's "ineptitude and general ineffectiveness" in performance of an assignment. Ibid.

11. On April 5, 1973, Mr Carson issued a written reprimandto Mr. Lum for his non-performance of work on February 28, 1973, and March 3, 1973. D's 21. The written reprimand states that Mr. Lum was previously

given a verbal warning. Accordingly, the written reprimand constituted a "second warning". Ibid The reprimand further states: "You are hereby informed that the next violation of Civil Service Rules could result in suspension or dismissal from employment with the City and County of Honolulu." Ibid

12. On Dec. 17, 1976, in a memorandum from Alexander Oka to Mr. Lum regarding the Audit of the Liquor Commission Oka stated that Mr. Lum's "one page description of the Liquor Commissions's cash handling procedure is inadequate." D's 22. Mr Oka then provided Mr. Lum with detailed instructions on how to properly complete the assignment. Id at 1-3

13. In a memorandum from E.T. Hara to Arlie Carson it is noted that Mr. Lum had continuously been reminded that he was spending too much time pursuing personal business and grievance matters. D's 23

14. On November 27, 1978, Samuel T. Hata, Director of Finance, informed Mr. Lum that he was suspended for 10 days for: (a) Excessive use of sick leave; (b) Excessive

use of working time to accomplish personal business; and (c) Malingering. D's 24

15. A number of "Performance Evaluation Reports" were received into evidence covering almost the entire duration of Mr. Lum's employment. See D's 33-43. In these reports, Mr. Lum generally was evaluated as "Meets Requirements." In most of these reports, however, the evaluator provided additional comments discussing Mr. Lum's work habits. Id. These comments generally stated that Mr. Lum harbored a poor attitude towards his work which adversely affected his ability to complete his tasks adequately. Id

16. Concerning Plaintiff's job performance the arbitrator found:

> While the evidence paints a clear picture of Grievant (Plaintiff) as a lone wolf manifesting a number of socially unattractive traits and behavior, the Arbitrator can find no objective evidence that Grievant's discharge was motivated by any racial discrimination or personal dislike on the part of his supervisors. Supervisory dissatisfaction with negative attitudes and non-productive work habits cannot be equated to dislike of the person. If anything, Grievant's supervisors and superiors manifested an overabundance of patience and tolerance of his poor record as an employee over the entire 12 year period, and it is a

source of wondermont why Employer did not invoke the sufficient grounds for termination that accumulated within the firsf several ye ars of his tenure. The argument that Grievant was disparately treated from other employees with isolated instances of similar timesheet deficiencies is not persuasive where none of these other employees manifested a long and unrelenting history of unproductive and unsatisfactory work performance as in Grievant's case." D's 55 at 15

17. Less than one month after completing his November 27, 1978 suspension Mr. Lum received a memorandum from Arlie Carson expressing disapproval of Mr. Lum's use of work time for non-work related activities. D's 44. Mr. Lum is warned that "(f)ailure to commit your entire working time to assigned work will be cause for disciplinary action." Ibi

18. Eight days after receiving the memorandum referenced above Arlie Carson transmitted another memorandum to Mr. Lum again expressing disapproval of Mr. Lum's failure to work on City assignments while on the City and County payroll. D's 45. Again, Mr. Lum is warned that failure to comply will result in disciplinary action, including dismissal, Ibi

19. On January 22, 1979, approximately one month after receiving the two warnings

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discussed immediately above, Mr. Lum is again admonished by Arlie Carson for failing to work on City projects while on City time. D's 46. Mr. Lum is once aga in warned. Ibid.

20. On January 30, 1979, Mr. Lum is warned for failing to commit his work time to production of City assignments. D's 47.

21. On February 5, 1979, Mr. Lum is again warned for the lack of production. D's 48. Also, in this memorandum, Arlie Carson questions Mr. Lum's competence to perform asignments, and notes Mr. Lum's excessive use of sick leave and vacation. Ibid. Subsequently, Mr. Lum received three weekly reports in Feb. 1979 indicating his work was satisfactory. P's 6, 7, and 8.

22. During late 1976 to early 1977 Arlie Carson submitted a number of selected files containing working papers, completed reports, and other relevant materials to an independent Certified Public Accountant for review and evaluation. D's 56. The evaluation covered work prepared by Alexander Oka, Albert Lum, Ernest Hara, and Edgar Lum. Ibid.

Mr. Lum rated the lowest of the four employees in the evaluation. The evaluator found indications that Mr. Edgar Lum's professionalism was "Lacking." Ibid. Moreover, Mr. Lum's work was found "incomplete" and unrefined. Ibid

23. Arlie Carson testified that throughout his career at the City and County many of the phone calls received by Mr. Lum related to his personal business dealings.

24. Arlie Carson further testified that Mr. Lum was involved in real property litigation, and that this was a major reason why Mr. Lum requested sick leave.

25. Arlie Carson also testified that he warned Mr. Lum on at least 12 occasions that his work was inadequate.

26. Arlie Carson also testified that on at least two assignment performed by Mr. Lum the results were unusable.

Attempts to Relocate Mr. Lum

27. During the 1975-76 time period Arlie Carson attempted to relocate Mr. Lum to other departments within the City and County. These attempts were based on Arlie Carson's belief that a different environ-

ment with different supervisors and co-employees may help improve Mr. Lum's attitude towards his work.

28. Arlie Carson contacted the Dept. of Transportation and offered, on behalf of the Dept of Finance, to fund Mr. Lum's position at the Dept of Transportation if that department accepted the transfer. The Dept. of Transportation refused this offer based on knowledge of Mr. Lum's reputation.

29. Arlie Carson also contacted the Honolulu Police Dept concerning a possible transfer but this request was rejected based on Mr. Lum's reputation.

30. Arlie Carson next contacted Gene Carson (no relation to Arlie Carson) at the Liquor Commission. Gene Carson indicated that they could use Mr. Lum based on one condition. The condition was that Mr. Lum work for a stipulated period of time to review his work performance. If Mr. Lum performed satisfactorily then he would maintain his grade status for salary purposes. If Mr. Lum's work was not satisfactory then

his grade would be reduced to match his capabilities.

31. Arlie Carson testified that Mr. Lum rejected the Liquor Commission proposal.

32. Arlie Carson also arranged for Mr. Lum to be involved in the Visiting Nurses Program where a nurse visits the employee's home while the employee is ill. This program was unsuccessful as to Mr. Lum since the nurse went to Mr. Lum's home but Mr. Lum was not there.

33. Arlie Carson also enrolled Mr. Lum in the Troubled Employees Program for counselling. The first and second visits were made on the City and County's time. Mr. Lum made a third visit on his own time. It is uncerta in what effect this program had on Mr. Lum.

Sick Leave

34. During the years 1977-78 Mr. Lum took a tota l of 264 3/8 days of sick leave from his employment. D's 30

35. On May 4, 1979, Arlie Carson sent a letter to Mr. Davis Yogi, Union Agent-

HCEA, regarding Mr. Lum's sick leave. D's 32 This letter notes that "Mr Lum has taken an abnormal number of days of sick leave due to he adache, mental distress, dizziness and various other causes." I bid. It also recited that while on sick leave Mr. Lum was able to conduct his business ventures. Ibid

36. A memorandum dated Feburary 26, 1973, reflects that Mr. Lum's 1972 sick leave record included 21 incidences of illness, 9 of which were on either Monday or Friday. D's 26. The implication of this record is that Mr. Lum used his sick le ave in order to obta in long weekends.

37. An August 7, 1973 memorandum from Arlie Carson to Mr. Lum questioned a sick leave request by Mr. Lum based on information available to Mr. Carson that Mr. Lum was not ill on certain dates. D's 27.

38. Dr. Bernard Fong treated Mr. Lum during his employment with the City and County.

39. Dr. Fong was Mr. Lum's private physician and is an internist and cardiologist.

40. Dr. Fong first treated Mr. Lum on

Aug. 17, 1966 while Mr. Lum was working for the State of Hawaii.

42. Dr. Fong testified that he found nothing physically wrong with Mr. Lum.

43. Dr. Fong testified that Mr. Lum often complained of headaches, dizziness, and nausea; however, there were no indications of such symptons found by Dr. Fong.

43. Dr. Fong referred Mr. Lum to other doctors, including Dr. Stanford Au, a neurologist, to perform tests on Mr. Lum.

44. The tests failed to reveal any physical problem with Mr. Lum

45. Dr. Fong, in many instances, signed notes for Mr. Lum stating that Mr. Lum too ill to work.

46. Dr. Fong received a phone call from one of Mr. Lum's supervisors questioning whether Mr. Lum was ill since the dates on Dr. Fong's notes did not correspond with those days Mr. Lum was actually missing.

47. Dr. Fong testified that he felt his credibility was being eroded by Mr. Lum's actions due to Mr. Lum's failure to

be straightforward with him.

48. On Feb. 16, 1977, Dr. Fong referred Mr. Lum to a psychiatrist since Dr. Fong was of the opinion that Mr. Lum needed more help than Dr. Fong could provide.

Filing of EEOC Complaint

49. On May 11, 1979, Mr. Lum filed a complaint of discrimination with the EEOC

Parks Storeroom incident

50. On April 18, 1979, Mr. Lum received an assignment to "review and evaluate the the operational controls of the (Parks Department) Maintenance Support Services Storeroom and submit recommendations." D's 55(Arbitration Decision ("AD") at 8; P's 13

51. The estimated time of completion of the project was 200 hours. P's 13

52. On June 7, 1989, Mr. Lum submitted his 1 1/2 page report to Alexander Oka. P's 14; AD at 8

53. On June 8, 1989, Alexander Oka drafted a memo to Mr. Lum commenting on the June 7 report. There are six specific comments. In addition, Oka commented:

In summary I must say that I (sic) really rea lly (sic) disa pointed with this audit because you have merely parroted a previous report and did no thinking on your part nor any analysis (sic) on your part. I am also quite concerned in that you have spent so much time on this assignment and yet have very little to show for the effort. D's 8; and AD at 8

54. Mr. Lum's June 19, 1979 working papers state that Alexander Oka instructed Mr. Lum to "test-take physical & compare with records." D's 9 and AD at 8.

55. The arbitra tor found that working papers of Mr. Lum indicated that Mr. Lum performed further work on the Parks Storeroom on June 19-21 and July 3, 9, and 16. AD at 8. The time sheets of Mr. Lum reflect, however, that Mr. Lum logged 37 1/4 hours for the week ending June 29, 26 hours for the week ending July 6, and 37 1/2 hours for the week ending July 13, even though it appea rs that Mr. Lum did little, if any, work on the Parks Storeroom during those time periods. AD at 8; and D's 13

56. On July 9, 1979, A. Oka submitted a memorandum to Samuel Hata, Director of Finance, recommending Mr. Lum's dismissal

for insubordination. AD at 8; P's 15. The memo states that the reason for the recommendation was Mr. Lum's "refusal to do any appreciable work during the week ending Friday, July 6, 1979." P's 15. Arlie Carson, Executive Assistant Director and Mr. Lum received copies of this memorandum. Id.

57. On July 10, 1979, Mr. Lum responded to this July 9 memo stating his confusion on his job assignment and the due date. Mr. Lum also commented on the "intolerable working conditions" and his concern that he was being "continuously discriminated against and harassed." Messrs. Hata, Carson, Yogi (HGEA union agent), and Carpenter (Workers Compensation Div., Civil Service) were copied on this memo. AD at 8; and Memo of July 10, 1979 from Lum to Oka (No Exhibit number).

58 The arbitrator noted that "(t)he Motor Pool logs indicated Grievant drove a government vehicle on July 3 to the Parks storeroom and Grievant admitted in his testimony that he did not test the inventory

during the 7/9 to 7/13 week."AD 8; D's 15

59.On July 16, 1979, Alexander Oka wrote a memo to Mr. Lum memorializing their conversation that morning. AD at 8; D's 16. The memo's subject is: "Evaluation of Work Performance for the week ending July 13, 1979." Significantly, the memo recites that Mr. Lum's work performance was considered unsatisfactory for the following reasons:

1. Your admission that you made no effort to go to the Parks storeroom to perform the inventory test

2. Your working papers show that little work was done in the office which was to indicate several items that will be included in the test. However, this task cannot have taken 37 1/2 hours of working time. D's 16

60. The arbitrator found that after this meeting Plaintiff completed the work assignment as requested on July 16, 1979. However, at this time, Arlie Carson had already completed his investigation on behalf of Samuel Hata. The arbitrator characterized Plaintiff's completion of the assignment as "too little too late." AD at 8-9

61. The arbitrator also found:

The record shows that Grievan's employment with the City can best be characte rized as a continuing series of acrimonious, adversarial, deteriorating relationships with his supervisors arising out of his unacceptable work performance. Over the course of his employment, Grievant countered with a prodigious flow of memos critical of his supervisors for lack of supervisory guidance, inept supervision, animus, harassment and discrimination enforced by a series ofgrievances directed against his supervisors. In the words of the EAD (Arlie Carson) who spent much of his 10 year tenure with the Dept of Finance mediating and refereeing confrontations between Grievant and his supervisors, he vainly tried to find a supervisor that Grievant could work with and work for, "but no matter who supervised him, there was always trouble." One of Grievant's first supervisors complained to the Chief to re-assign Grievant because:

"I had a difficult time with him during any kind of work, he wouldn't listen to you, he wouldn't complete his assignments, he didn't document the things that are understood as a auditor .... and I have to finish his work or go out and search for the information myself." AD at 18-19.

62. The arbitrator further found:

In January 1979 after seven years supervising Grievant, the same supervisor wrote to the Chief stating: "I've had it. (sic)" and asked that Grievant be re-assigned or transferred to another division, otherwise that he (the supervisor) be transferred out. In January 1977, after the EAD had retained an outside CPA to evaluate the work of three analysts, including Grievant, the report showed grievant's work being evaluated most negatively of the three. In late 1978 when Grievant was referred for outside employee counselling, the counsellor concluded no progress could be made in Grievant's case:

"There was very persistent and ubitiquous (sic) reluctance to ever acknowledge any fault on his part. There was a total resistance to doing anything that would, in my opinion, enhance the relationships in that office."

Thus, a total picture emerges of a pathetically isolated individual rejecting his total working environment, and in turn being rejected by it, one who possessed the necessary capabilities and skills but whochose to withold his best efforts, a resolutely defiant figure marching to his own drum beat, firmly convinced that all others were out of step, but himself.

Was this employee's negative work habits (sic) and attitude reversible? Over his 12 year employment period, the record shows enumerable attempts by Employer to counsel, correct and rehabilitate Grievant to acceptable levels of performance and Grievant was afforded manifold opportunities along the way to reverse his downward spiraling work performance record. Indeed, the record shows that in desperation Employer even resortedto non-disciplinary recourses such as referring Grievant to the City Physician and his personal physicians for examinations, all of which produced the conclusion that Grievant was "okay physically" and cleared for return to work. Grievant was also referred to the "troubled employee program," which ultimately failed through Grievant's uncooperative refusal to participate. Where the EAD had "tried everything," but found "no hope," the ultimate discharge became inevitable, as most eloquently expressed in the EAD's own words:

"... We could see no change in attitude or conduct at all during the 10 year period that he was in, while I was there, in the Dept of Finance, and in determing the extent of punishment, we were at our wit's end to do anything. We just didn't know what else to do.

(")We had not been able to affect a resolvement of the situation no matter how much we tried, what we had done. It was the exact same thing as when we'd started, so in light of that, and not even having a glimer of hope to resolve the situation, the ultimate thing was to dismiss him, which we did." AD at 19-20

63. On July 18, 1979, Samuel Hata terminated Mr. Lum per letter of same date citing four reasons for dismissal. P's 1

64.At the Hawaii Public Employment Relations Board (HPERB) proceedings, Alexander Oka characterized the Parks Storeroom assignment as one of "medium" difficulty. D's 51-53 at 806. (Transcript of HPERB proceedings where Alexander Oka testified regarding the events in questions).

65. Alexander Oka testified at the HPERB proceedings' that Mr. Lum's initial report was within the estimated time of completion but he refused to accept the report because the report was deficient. Id at 809-10

66. Mr. Oka further testified that on June 19th Mr. Lum knew that he had to test the inventory. Id at 825

67. Mr. Oka also testified that Mr. Lum logging of 197 hours by June 7 for the work that was actually performed was not justified. Id at 829

68. Mr. Oka further testified that he tolerated Mr. Lum's substandard work on many occasions because the termination of Mr. Lum by Mr. Oka would amount to an "admission of failure" for making a bad choice in hiring Mr. Lum. id at 840

69. Mr. Oka sta tes that while Mr. Lum was under Albert Lum's supervision Mr. Edgar Lum and Mr. Oka had "some serious problems." Id at 905

70. Mr. Oka says he thinks he told Mr. Lum to perform a test check of the storeroom. Id at 911

71. Mr. Oka testified that he met with Mr. Lum on July 9, 1979 and following that meeting decided to terminate Mr. Lum. Id 924

72. During this meeting, "Edgar became belligerent and he didn't want to discuss the audit at all. His attitude at that meeting was don't bother me with this kind

of stuff, I got other things to do." Id 925

73. On July 9. Mr. Oka met with Arlie Carson. Id at 933

74. Also on July 9, Alexander Oka wrote a memorandum to Samuel Hata, Director of Finance, recommending Mr. Lum's termination for insubordination. D's 4. The request was based on Mr. Lum's "refusal to do any appreciable work during the week ending Friday, July 6, 1979" Ibid

75. On July 18, 1979, Mr. Lum received a letter of suspension without pay for 10 days, withtermination to follow after completion of the suspension. P's 1. Four reasons were given for the suspension/termination:

> 1. Excessive use of sick leave. The employer has the right to expect his employees to be able bodied, healthy and fully capable of doing work assigned him adequately. Your sick leave record leaves little doubt that you are not a responsible employee, and we see no expectation that the situation will improve overall.
>
> 2. Inability to perform assignments. On numerous accasion you have complained of mental stress, dizziness and headaches which prevent you from doing your assigned work.

3. Nonproduction of assigned work. Your work record is abundant with examples of lack of work production, loafing, and a lackadaisical, uncaring attitude toward your work.

4. Attitude toward your job. You have exhibited the attitude of a disgruntled employee toward your employer, your work and your fellow employees which transmits the image of an unhappy, dissatisfied, uncooperative and unproductive employee. P's 1

76. Arlie Carson drafted the July 18, 1979 suspension/termination letter. Samuel Hata approved this letter. This letter was also reviewed by the City and County of Honolulu's Corporation Counsel and the Civil Service Commission in order to ensure compliance with the applicable laws and regulations.

77. Mr. Lum did not receive a pretermination hearing with either Arlie Carson or Samuel Hata.

78. Arlie Carson testified, however, that he read Plaintiff's version of the incident in his letter of July 10, 1979, and that a pretermination hearing would not have changed or altered the suspension/termination decision.

79. Mr. Lum did receive a ten-day notice of his termination.

80. Mr. Lum testified that after his termination he suffered headaches, nausea, and dizziness. Mr. Lum also testified that he is embarrassed and humiliated at social functions because of the termination from his employment.

81. Mr. Lum testified that these conditions resulted from his inability to tell his side of the story prior to his termination.

82. Except for the humilation and embarrassment, Mr. Lum complained of headaches, nausea, and dizziness prior to his termination as well.

83. After his termination, Mr. Lum had strained relations with his siblings due to his mother's favoritism of Mr. Lum in the family's real property dealings.

84. These strained relations also contributed to Mr. Lum's emotional condition.

Miscellaneous

85. Arlie Carson testified that during Mr. Lum's career at the City and County

he met with Mr. Lum to hear Mr. Lum's complaints over 300 times.

86. Arlie Carson testified that the decision to terminate Mr. Lum was not based on any discriminatory grounds.

Progressive Discipline and Grievance Procedure

for continued violations of employment policy. The final action in the progressive discipline could include dismissal.

88. As part of the Progressive Discipline procedure the employee received counseling and other rehabilitive effort. in an attempt to avoid repetition of the incident giving rise to the disciplinary action.

89. Arlie Carson testified as to four steps in the grievence procedure. This first step is a hearing with the Division Head (Alexander Oka). The second step is a face to face meeting with the Dept Head (Samuel Hata). P's 22. The third step is a meeting with the Director of Civil Se rvice (Harry Boranian). The fourth step is handled by the union pursuant to the grievance procedure

in the collective bargaining agreement.

90. Upon suspension/termination the evidence is unclear as to whether Mr. Lum met with Samuel Hata, the Dept Head. The third step was not utilized either as evidenced by a memorandum from Harry Boranian, Director of Civil Service to the Civil Service Commision. P's 24. In this memorandum concerning Mr. Lum's "Petition of Appeal," Mr. Boranian states that the appeal is "not within the purview of the Civil Service Commission since it is handled under the Collective Bargaining Agreement. Ibid. The fourth step was eventually completed in 1987 after Mr. Lum's arbitra tion was completed.

Grievance Procedure and Arbitration Award

91. Mr Lum attempted to grieve his termination.

92. Mr. Lum's union, HGEA, refused to take Mr. Lum's grievance to arbitration.

93. Mr. Lum filed a complaint against the City and County and the HGEA with the Hawaii Public Employment Relations Board (HPERB) on August 4, 1980

94. Mr. Lum prevailed at the HPERB proceeding which ruled on Jan. 18, 1985 that HGEA refer the matter to binding arbitration and represent Mr. Lum at that proceeding.

95. The arbitration proceeding was heard over the course of 15 days between Feb. 10 and March 21, 1986.

96. The Arbitration Decision and Award was rendered on Jan. 14, 1987 by Ted T. Tsukiyama. D's 55 or AD

97. The record developed in that proceeding was significantly more voluminous than the trial of this cause. The record included 2,650 pages of testimony and 228 separate documentary exhibits. D's 55 at 2

98. The Arbitration Decision fully develops the factual and procedural background of this matter.

99. The Arbitrator's decision is well-supported and well-reasoned.

100. Mr. Lum complains that he was not fairly represented at the arbitration proceeding due to frequent disagreement with his counsel. The Arbitration proceeding demonstrated

significant procedural fairness, however. Plaintiff was allowed to present and cross examine witnesses and a complete written record was developed by the arbitrator. Moreover, the arbitrator was experienced and able to handle all aspects of the hearing. The Arbitrator's decision also reflects that the issues were bitte rly contested and that Mr. Lum's attorney adequately represented Mr. Lum. Although there was some testimony by Mr. Lum that his relationship with his attorney during the arbitration was strained this evidence is overshadowed by the arbitrator's finding that the issues were bitterly disputed.

Alleged Discrimination/Retaliation

101. Mr. Lum presented no objective evidence of discrimination leveled against him during his tenure at the City and County.

102. Similarly, Mr. Lum failed to link his termination with his filing of the EEOC complaint.

103. Mr. Lum's testimony that within one month of his filing the EEOC complaint

Alexander Oka told him he would be fired for taking this action is not credible. The first time this testimony was revealed was at the trial of this cause. Given the importance of the statement, if true, Mr. Lum would have disclosed this fact to one of his supervisors before or after termination, and certainly in the arbitration proceeding. The failure to reveal this alleged statement by Mr. Oka (who was unavailable to testify at this trial due to longstanding illness during the course of this decade old litigation, as well as this Court's observance of Mr. Lum's demeanor while testifying, raises serious questions concerning Plaintiff's credibility.

CONCLUSION OF LAW

1. If any conclusions of law are construed to be findings of fact then they shall be so characterized.

Jurisdiction and Venue

2. This Court has original jurisdiction under 28 U.S.C. #1343 and 28 U.S.C. #1331 for Plaintiff's causes of action arising under

42 U.S.C. #2000e-5, 42 U.S.C. #1983, and the Fifth and Fourteenth Amendents to the U.S. Constitution.

3. All conditions presedent to jurisdiction under 42 U.S.C. #2000e-d(e) and (f) have been met;

(1) Plaintiff filed discrimination charges within 180 days of the commission of an unfair employment practice;

(2) a notification of Right to Sue was received by Plaintiff on July 17, 1990;

(3) the complaint was filed in district court within 90 days of receipt of the Notification of Right to Sue.

4. Venue is proper in the District of Hawaii under 28 U.S.C. #1391

5. This Court accepts jurisdiction over Plaintiff's pendent sta te claim arising under Hawaii Revised Statutes #76-46.

Arbitration Decision

6. In an earlier order, this Court ruled that the arbitrators decision would not be given full faith and credit under Caldeira v. City of Kauai, 866 F 2d 1175, (9th Cir), cert denied __ U.S. __, 110 S. Ct 69 (1989) since the sta te court's confirmation of the award in this case did not

review the merits of the Title 7 claim. Lum v. City & County of Honolulu, 728 F Supp 1452 (D. Haw. 1989). In Caldeira, the Ninth Circuit found that the state court's confirmation of the arbitration award constituted a judicial decision for purposes of 28 U.S.C. #1738 since the state court reviewed the merits of the Plaintiff's claim. 866 F 2d 117

7. However, this Court, in its discretion, is entitled to accord such weight as it deems appropriate to the arbitration decision rendered in this case. Alexander v. Gardner-Denver Co; 415 U.S. 36, 60 (1974) (footnote omitted). This Court has considered the "degree of procedural fairness in the arbitral forum, (the) adequacy of the record with respect to the issue of discrimination, and the special competence of the arbitrator ()" Id at n. 21, and concludes that Plaintiff received a fair arbitration hearing in which he was allowed to present and cross-examine witnesses, as well as have complete written record entered. See also Lum v. City & County of Honolulu, 690

F Supp 914, 916 (D Haw 1988). The Court also concludes that the arbitrator was qualified to preside at the hearing and added to the overall procedural fairness of the proceeding.

8. This Court concluded that Mr. Lum was forcefully and competently represently by his attorney during the arbitration proceeding.

9. Balancing the relevant factors discussed in Alexander this court shall give significant weight to the arbitrator's decision. See id at n. 21. This Court is mindful, however, that Title 7 claims are to be reviewed de novo in the judicial forum. Thus, this Court has carefully considered all of the evidence presented in this trial, including the Arbitra tion Decision, in reviewing Plaintiff's Title 7 and other claims.

Retaliatory Discharge Claim

10. Mr. Lum is a person of chinese ancestry and race and is within a protected group as provided by 42 U.S.C. #2000e. Yee

v. Dept of Enviromental Services, 826 F 2d 877, 881 (9th Cir 1987)

11. City and County is a municipal corporation within the State of Hawaii and is an employer within the State of Hawaii and is an employer within the meaning of 42 U.S.C. #2000e et seq.

12 As a civil service employee under HRS Chapter 76 Mr. Lum has a property interest in continued employment. Cleveland Bd. of Educ. v.Loudermill, 470 U.S. 532, 538-39(1985)

13. Mr. Lum has the initial burden of establishing a prima facie case of retaliation by showing that he engaged in a protected activity, that he was thereafter subjected by his employer to adverse employment action, and that a causal link exists between the two. Miller v. Fairchild Indus., Inc., 885 F 2d 498, 504, n. 4 (9th cir 1989); Accord, Yartzoff v. Thomas, 809 F 2d 1371, 1375 (9th Cir 1987); Cohen v. Fred Meyer, Inc., 686 F 2d 793,796(9th Cir 198

14. Assuming without finding that Mr. Lum has esta blished a prima facie case

the burden then shifts to the City and County to articulate a legitimate non-retaliatory reason for the adverse action. Miller, 585 F 2d at 504, n 4. The City and County articulated several legitimate non-retaliatory reasons for terminating Mr. Lum including Mr. Lum's failure to perform assigned work, inability to complete assignment, and a poor attitude toward his job. The City and County produced overwhelming evidence sufficient to dispel the inference of retaliation raised by Mr. Lum.

15. Assuming without finding that Mr. Lum established a prima facie case this Court concludes that the City and County of Honolulu met its burden. The City and County exhausted extensive progressive discipline over an extended period of time without satisfactory improvement on Plaintiff's part. The Parks Storeroom incident of failure to perform an assignment was the "last straw" and evidenced a long pattern of such disruptive work.

16. The burden then shifts to Mr. Lum

to show that the asserted reasons proffered by the City and County were a pretext for retailiation. Miller, 885 F 2d at 504, n 4

17. Mr. Lum has failed to meet this burden. Mr. Lum's only evidence that the City and County's proffered reasons were pretextual was an alleged statement by Alexander Oka that Mr. Lum would be terminated for filing his EEOC complaint. In its findings of fact this Court found this statement by Mr. Lum to be not credible. The only other evidence of pretext is the proximity in time between the filing of the EEOC complaint and the te rmination. This evidence is insufficient to prove the reasons were pretextual in light of the overwhelming evidence justifying Mr. Lum termination.

18. The burden of persuading the court that the defendant unlawfully retaliated against Mr. Lum remains at all times with Mr. Lum. Cohen, 686 F 2d at 797, citing, Texas Dept of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (other citation omitted). Mr. Lum failed to meet his ultimate

burden of persuasion.

Procedural Due Process

19. This Court previously held that the City and County's failure to provide a pre-termination hearing to Mr. Lum offering Mr. Lum an opportunity to present his side of the story violated Mr. Lum's constitutional rights under the Due Process Clause. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985), and Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgement filed Oct 31,1989

20. Because the right to procedural due process is "absolute" Mr. Lum is entitled to nominal damages without proof of actual injury. Carey v Piphus, 435 U.S. 247,266(1978)

21. At least one circuit has determined, relying on Carey, that "(i)f the plaintiff can prove that she sould in fact have been retained had full procedural due process been provided, she may be reinstated." McGhee v Draper, 639 F 2d 639, 646 (10th Cir 1981). See also Carey v. Piphus, 435 U.S. at 261, n 16 (implying that such a

remedy is available), and Zinermon v. Burch ___ U.S. ___, 110 S. Ct. 975, 988, n 19 (1990) (also implying that such a remedy exists). Assuming that the Ninth Circuit would follow such a rule this Court concludes that Mr. Lum failed to prove that he would have been retained had full procedural due process been provided. Accordingly, Mr. Lum is not entitled to reinstatement.

22. Another remedy for violation of Mr. Lum's due process rights is mental and emotional distress damages if proved. Zinermon, 110 S. Ct. at 988, n. 19; Carey, 435 U.S. at 63-64. Mr. Lum's testimony established that he, in fact, has suffered mental and emotional distress over the City and County's failure to provide a pretermination hearing. There was also evidence of emotional distress presented, howeve r, that was not proximately caused by the City and County's actions. First, many of the physical symptoms accompanying Mr. Lum's emotional distress-headaches, dizziness, and nausea- were exhibited by Mr. Lum for many years prior to his termi-

nation. Also, Mr Lum's strained family relationship also contributed to Mr Lum's emotional distress. Although the causal link between the City and County's actions is questionable this Court concludes that there was sufficient probative evidence of some embarassment and humiliation by Mr. Lum caused by the denial of a pretermination hearing to justify an award of $8,000.00 to Mr. Lum for his emotional suffering.

Relief under HRS #76-46

23. HRS #76-46 provides in part:
No dismissal or demotion of a regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

24. On July 18, 1979, by letter to Mr. Lum from Samuel Hata, Mr. Lum was given the requisite ten-day notice under HRS #76-46. See Bugbee v. Kimmich, 42 Haw. 122, 124-25 (1957). The fact that for the ten days pre-

ceding his termination date Mr. Lum was suspended without pay is of no legal significance and does not affect the validity of the notice.

25. Given the City and County's compliance with HRS §76-46 Mr. Lum is not entitled to recovery under this section.

Punitive Damages

26. Assuming without holding that punitive damages are recoverable under §1983, see Carey, supra, 435 U.S. at 257, n. 11, this Court concludes that Mr. Lum has failed to prove that the City and County or any of its agents or employees acted with malicious intention to deprive Mr. Lum of his rights or to do him any other injury.

27. This Court notes that the City and County exhausted reasonable Progressive Discipline efforts, as well as counselling and referral to the Troubled Employees Program. Also, Arlie Carson took steps to determine whether or not Plaintiff was unfairly treated and even attempted to reassign Plaintiff to

a different department. In short, the City and County made every conceivable effort to accommodate Plaintiff. These efforts were unav ailing, however.

28. The City and County also acted diligently and in good faith in sending its letter of termination to Plaintiff. The evidence reflected that Arlie Carson consulted with the City Attorney and the Civil Service Commission to ensure that the termination procedure, including the letter of termination, was in accordance with the applicable rules and regulations.

Attorneys' Fees

29. Mr. Lum is entitled to his attorneys' fees in litigating the due process issue only. 42 U.S.C. #1988; see also Carey, supra, 435 U.S. at 257, n 11. Counsel for Mr. Lum has been instructed to submit an affidavit in support of his fees and counsel for the City and County shall then have the opportunity to respond. The amount of attorneys' fees shall be determined in a separate order.

30. Because Mr. Lum is not a prevailing party under 42 U.S.C. #1988 (except as to the due process issue) Mr. Lum is not entitled to recove r his attorneys's fee other than those awarded above.

Dated at Honolulu, Hawaii Aug. 29, 1990

signed Alan C. Kay
United States District Judge

APPENDIX B

United States Court of Appeals
For the Ninth Circuit

Edgar H.W. Lum,
Plaintiff-Appellant,

v.

City and County of Honolulu,
Defendant-Appellee

No. 90-16452
D.C. No. CV-
80-00384-ACK

Edgar H.W. Lum,
Plaintiff-Appellee,

v.

City and County of Honolulu,
Defendant-Appellant

No. 90-16732
D.C. No. CV-
80-00384-ACK

Order and
Amended Opinion

Appeal from the U.S. District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
February 12, 1992-San Francisco, California

Filed March 17, 1992
Amended June 15, 1992

Before: Alfred T Goodwin, Jerome Farris
and Cecil F. Poole, Circuit Judges

Opinion by Judge Goodwin

SUMMARY

Appeals/Employment Discrimination

The court of appeals affirmed in part and reversed in part a district judgement and dismissed in part an appeal from the judgement. The court held there is no need

to review denials of summary judgement after there has been a trial on the merits.

Appellant Edgar Lum was dismissed from his job with appellee the City and County of Honolulu. Lum filed suit, alleging violations of Title 7, due process rights, and a state statute. The City claimed he was fired for good cause. The federal suit was stayed pending resolution of a grievance filed under an agreement between Lum's union and the City. Eventually, seven years after he was terminated, arbitration hearing were held, and it was determined that he was fired for misconduct, not for the reasons he alleged. A state labor relations board dismissed a motion to vacate. Lum appealed thedismissal to a state court. The court affirmed. Later the state court granted a motion to confirm the arbitration decision. The City moved for summary judgment. The motion was denied because appeals were still pending. It was renewed and denied a second time. A two-day bench trial was held in district court. The court determined that Lum

was fired for legitimate cause. The court also held, however, that failure to provide him a pretermination hearing violated his due process rights; the court awarded damages and attorneys' fees. Finally, the court held the City had not violated the sta te statute. Lum appealed, and the City cross-appealed.

(1) The appropriate forum to review denial of a summary judgement motion is through inte rlocutory appeal. There is no need to review denials of summary judgement after there has been a trial on the merits.

(2) The district court's award of damages to Lum was not extreme or outrageous on its face, and no rea son was presented that the amount was not appropriately discounted. The court's findings were not clearly erroneous.

(3) Even if the City violated the state statute, it does not follow that Lum was entitled to additional relief. Both the arbitrator and the district court concluded he was te rminated for good cause and that the result would not have been different if he had received pretermination notice and

a hearing.

COUNSEL

Evan R. Shirley, Honolulu, Hawaii, for the plaintiff-appellant

Rodney Veary, Deputy Corporation Counsel, City and County of Honolulu, Honolulu, Hawaii, for the defendant-appellee

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ORDER

In reviewing the case, our attention has been called to the cross appeal's contention that even after prevailing in a trial on the merits, the city was entitled to have an advisory opinion on the question whether the trial court had erred in denying the city's motion for summary judgement. We declined to review the Trial court's ruling, citing Locricchio v Legal Services Corp, 833 F 2d 1352 (9th Cir 1987).SLIP Op 2669 at 2674

The opinion file March 17, 1992 is amended by adding a footnote signal at the end of the last paragraph on page 2674, with the footnote to read as follows: In Wilson Ar-

lington Co v. Prudential Ins. Co, 912 F 2d 366 (9th Cir 1990), reversing a judgement entered after a trial, we held that a proper reading of the law of Virginia would have excluded the parole evidence introduced at trial to vary the terms and conditions of an integrated written contract and summary judgement should have been given for the plaintiff. While the opinion did not cite Locricchio, the cases are not inconsistent. Wilson Arlington was about the parole evidence rule, and did not consider or discuss the reviewability vel non of the denial of summary judgement after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parole evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in Locriccho, where we said "the majority rule appears to be that the denial is not properly reviewable on an appeal from the final judge-

ment entered after trial." In a footnote, we said "see Hilton v Hanaw, 522 F 2d 588, 603 (9th Cir 1975)". We went on to point out that because the challenged judgement in Hilton had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appealability of the denial of summary judgement, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgement upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgement has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretial ruling on summary judgement after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into

decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in Sakamoto v. Duty Free Shoppers, Ltd 764 F 2d 1285, at 1288 (9th Cir 1985), cert denied, 475 U.S.1081(1986).

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing. Judges Farris and Poole have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matte r en banc. Fed. R. App. P. 35

The petition for rehearing is Denied and the suggestion for rehearing en banc is Rejected.

OPINION

Goodwin, Circuit Judge

In 1979 the defendant, City and County of Honolulu("City"), fired the plaintiff from his position as an accountant. The plaintiff

appeals the district court's finding that his termination was not in violation of Hawaii (HRS") #76-46. The defendant cross-appeals the denial ofits motion for summary judgement on the Title 7 claims and the amount of damages awarded to the plaintiff for the violation of his due process rights resulting from the denia l of a pretermination hearing.

The district court had federa l question jurisdiction over Lum's Title 7, and due process claims under 28 U.S.C. ##1331, 1337, and 1343, and 42 U.S.C. #2000e-(f)(3). The court had pendent jurisdiction over the state law claims. This court has jurisdiction pursuant to 28 U.S.C. #1291. Notices of appeal were timely filed. Fed. R. App. P. 4(a)

I

Mr. Lum had been an employee with the City of Honolulu for twelve years when, in 1979, he was dismissed from his job as an "Internal Control Analyst." Lum filed suit against the City alleging violations of Title 7 of the Civil Rights Act of 1964, due process, and HRS #76-46. Plaintiff claimed that his dis-

missal was based on race discrimination and and was in retaliation for filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). The City claimed that Lum was fired for ineffective work performance, abuse of sick leave, and poor work attitude. Plaintiff also challenged the manner in whic h he was discharged.

The federal suit was stayed pending resolution of Lum's grievance under the collective bargaining agreement between Lum's union, the Hawaii Government Employees Association, and the City. The grievance process went through three stages at which point the union refused to represent Lum in arbitration. After a separate, lenghthy battle, Lum prevailed in his fight with the union and the matter was slated for arbitration. In early 1986, almost seven years after the termination, arbitration hearings were held and on January 27, 1987 a decision was filed concluding that the plaintiff had been fired for misconduct and that the discharge was not motivated out of racial discrimination or in

retaliation for his filing a claim with the EEOC.

Lum filed a motion before the Hawaii Labor Relations Board to vacate the arbitration decision. The Board dismissed the motion because it lacked the authority to vacate an arbitration award. An arbitration decision can be challenged only in Hawaii Circuit Court pursuant to HRS Chapter 658. Rather than attacking the arbitration decision under Chapter 658, Lum appealed the Board's dismissal of his motion to the Hawaii Circuit Court. The Board's decision to dismiss his motion was affirmed by both the Circuit and the Hawaii Supreme Court. Meanwhile, the City moved in Circuit Court to confirm the arbitration award pursuant to HRS #658-8. The motion was granted on the grounds that the arbitration award had not been vacated or othwise modified. Lum appealed this grant to the Hawaii Supreme Court which again ruled against him.

On June 3, 1988 the City moved for

summary judgement in the present action on the Title 7 claim arguing that the arbitrator's decision should be given preclusive effect. The motion was denied, in part, because appeals were still pending in state court. See Lum v. City and County of Honolulu, 690 F Supp 914 (D Haw 1988)(Lum I). The Motion was renewed on March 23, 1989 after all sta te appeals had become final. For a second time it was denied. See Lum v. City and County of Honolulu, 728 F Supp 1452 (D Haw 1989)(Lum II). The district court gra nted the City's motion to certify the denial of summary judgement for inte rlocutory appeal pursuant to 28 U.S.C. #1292(b). We did not permit the appea l to be taken.

After a two day bench trial, the district court ruled for the City on the Title 7 claims, finding that the City had legitimate cause to fire Mr. Lum. The court held, however, that the City's failure to afford Mr. Lum a pretermination hearing violated his due process rights and awarded the plaintiff actual damages in the amount of

$8,000 and attorneys' fees with respect to that issue. Finally, the court ruled that the City had not violated HRS #76-46.

II

On cross-appeal the City asks us to reverse the district court's denial of its motion for summary judgement on the Title 7 claims. The City argues that the district court's decisions are inconsistent with our opinion in Caldeira v. County of Kauai, 866 F 2d 1175 (9th Cir), cert. denied, 493 U.S. 817 (1989). While the City was denied summary judgement, it was awarded judgement on the Title 7 claim after a trial on the merits.

In Locricchio v. Legal Services Corp, 833 F 2d 1352, 1358-59 (9th Cir 1987), we refused to review the denial of a summary judgement motion by a party who had suffered an adverse judgement on the merits. "We hold therefore, that the denial of a motion for summary judgement is not reviewable on appeal from a final judgement entered after a full trial on the merits." Id

Locricchio is somewhat at odds with our

earlier opinion in Hilton v. Mumaw, 522 F 2d 588, 603 (9th Cir 1975). Mumaw was denied summary judgement but received a directed verdict. Hilton appealed from the directed verdict while Mumaw cross-appealed from the denial of summary judgement. Without specifically addressing the issue of reviewability, we entertained the cross-appeal. "(A)s to issues upon which we reverse the directed verdict, we affirm the denial of summary judgement. As to issues upon w hich we affirm the directed verdict, we dismiss the cross appeal as moot." Id. We reasoned in Locricchio that we were not bound by Hilton because the decision did not address the issue of reviewability.

(1) The appropriate forum to review the denial of a summary jedgement motion is through interlocutory appeal under 28 U.S.C. # 1292(b). The defendant's efforts to seek inte rlocutory appe al were unsuccessful. We follow the teaching of Locricchio and hold that there is no need to review denials of summary judgement afte r there has beam

a trial on the merits. Such a review is a pointless academic exercise. The City's cross-appeal of the denial of the summary judgement motion is dismissed (footnote 1)

III

The district court awarded Lum partial summary judgement on the due process claim. The court found that Lum had a property interest in continued employment and was entitled to due process, including adequate notice of the charges and an opportunity to be heard, prior to teemination. The court hel that the City violated these rights when it terminated the Plaintiff without a pretermination hearing. The City does not appeal this decision. The City does appeal the award of $8,000 in actual damages.

The computation of damages is a finding of fact tha t is reviewed under the clearly erroneous standard. Galindo v. Stoody Co 793 F 2d 1502, 1516 (9th Cir 1986). The district court concluded that "(a)lthough the casual link between the City and County's action is que s tionable this court concludes that ther

was sufficient probative evidence of some embarassment and humiliation by Mr. Lum caused by the denial of a pretermination hearing to justify an award of $8,000."

(2)On appeal, the City challenges the evidence but fails to establish that the district court ignored relevant factors in calculating the award. The award is not extreme or outrageous on its face. No reason is presented to suggest that the amount of damages was not appropriately discounted. We hold that the district court's findings were not clearly erroneous, and affirm the award.

IV

Hawaii law mandates that certain steps be taken before an employee in Mr. Lum's position can be fired. The relevant statute provides:

> No dismissal or demotion of any regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

HRS #76-46. The corresponding Civil Service Rule states:

> When an employer is dismissed or demoted, a written notice setting forth the specific reasons for the dismissal or demotion shall be given to the employee at least ten calendar days before the effective date of such dismissal or demotion and a copy thereof shall be filed with the Director.

Civil Service Rule 10.3(c)

Mr. Lum was handed a letter stating that he was being suspended for ten days wiithout pay at the end of which period he would be discharged. The district court held the City's actions did not violate #76-46 and that the ten day suspension without pay was "of no legal significance." A district court's construction of state law is reviewed de novo. Sax v. World Wide Press Inc, 809 F 2d 610, 613 (9th Cir 1987).

The statutory language and the state case law d o not provide a clear indication whether the Hawaii Supreme Court would find that a ten day suspension without pay prior to termination would violate #76-46. Courts in other jurisdiction have held th t similar practices violate federal due process. See Thurston v Dekle, 531 F 2d 1264, 1272(5th Cir 1976), vacated on other grounds, 438

U.S. 901 (1978), relevant portions reinstated 578 F 2d 1167 (5th Cir 1978); Gniotek v. City of Philadelphia, 808 F 2d 241, 243-44 (3rd Cir 1986), cert. denied 481 U.S. 1050 (1987).

(3) Even if the City violated #76-46, it does not follow tha t Mr. Lum is entitled to additional relief. He was awarded $8,000 for essentially the same claim brought as a federal action. In holding that the termination of a teacher violated HRS #297-12, a provision similar to #76-46, the Hawaii Supreme Court addressed the issue of remedy.

Wtih respect to plaint8ff's request for a declaration that Shorba is entitled to reinstatement to his former position with back pay, we hold that Shorba is not entitle to such relief at this time, that he remains on suspension without pay pending the hearing; and that in the event that the hea ring results in his favor, he will then be entitled to resume his former position with back pay. Shorba v. Shiro Amioka, 54 Haw 43, 501 P 2d 807, 813 (1972). Lum has received two extensive

post termination hearings and both the arbitrator and the district court concluded that he was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing. On these facts we hold that the plaintiff is not entitled to additional relief under sta te law.

Because the plaintiff is not entitled to further relief, we need not decide whether the City's actions violated #76-46. The district court's finding th t there had been no violation of #76-46 is vacated, as it was not necessary to the decision of the case. We express no opinion on that issue because it is moot.

DISMISSED IN PART, AFFIRMED IN PART, AND VACATED IN PART

footnote 1 In Wilson Arlington Co v. Prudential Ins. Co, 912 F 2d 366 (9th Cir 1990), reversing a judgement entered afte r a trial, we held tha t a proper reading of the law o f Virginia would have excluded the parole eidence introduced at trial to vary the terms and conditions of an integrated writte

contract and summary judgment should have been given for the plaintiff. While the opinion did not cite Locricchio, the cases are not inconsistent. Wilson Arlington was about the parol evidence rule, and did not consider or discuss the reviewability vel non of the denial of summary judgement after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parol evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in Locricchio, where we said "the majority rule appears to be that the denial is not properly reviewable on a appe al from the final judgmententered after trial." In a footnote, we said "see Hilton v. Mumaw, 522 F 2d 588, 603 (9th Cir 1975)" We went on to point out that because the challenged judgment in Hilton had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appea lability of the denial of summary judgment, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgment upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgement after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in Sakamoto v Duty Free Shoppers, 764 F 2d 1285, 1288(9th Cir 1985) cert denied, 475 U.S. 1081 (1986).

JUDGMENT

United Sta tes Court of Appeals
For the Ninth Circuit

Edgar H.W. Lum,
Plaintiff-Appellant

No. 90-16452
CT/AG #CV-80-00384 ACK

v.

City and County of Honolulu,
Defendant-Appellee

No. 90-16732
CT/AG# CV-80-00384-ACK

Appea l from the U.S. District Court for the U.S. District Court for the District of Hawaii

This Cause came on to be heard on the transcript of the Record from the U.S. District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this cause be, and hereby is DISMISSED IN PART, AFFIRMED IN PART, AND VACATED IN PART

Filed and entered 6/15/92

A true copy, Cathy A. Catterson, Clerk of Court, attest 7-14-92

U.S. Court of Appeals
For the Ninth Circuit

Edgar H.W. Lum,
Plaintiff-Appellant
v.
City and County of Honolulu,
Defendant-Appellee

No. 90-16452
D.C. No. CV80-00384ACK

Edgar H.W. Lum,
Plaintiff-Appellee
v.
City and County of Honolulu,
Defendant-Appellant

No. 90-16732
D.C. No. CV80-00384ACK

PETITION FOR REHEARING SUGGESTING APPROPRIATENESS OF HEARING IN BANC

To the Honorable Judges of the U.S. Court of Appe als for the 9th Circuit: Edgar Lum, the appellant above named, respectfully suggests that the above-entitled proceeding is appropriate for consideration by all the judges of this court convened in banc, and in support of this suggestion petitioner shows:

1. Point of fact or law overlooked in the decision: HRS 76-46 which states that no dismissal or demotion of any regular emplyee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given the employee a written statement

setting forth the specific reasons upon which the dismissal or demotion is based. This court: (a) vacatedthe district court's finding that there was no violation of HRS 76-46 but expressed no opinion on this issue because the court said it was moot and therefore it was not necessary for this court to decide whether the City violated this section; (b) noted that appellant received two post termination hearings and both the arbitrator and district court concluded that appellant was terminated for good cause and the result would not have been different if appellant had received pretermination notice and hearing and therefore is not entitle to additional relief under state law; (c)said that even if the City violated HRS 76-46 it does not follow that appellant is entitled to additional relief as he was awarded $8,000 for mental and emotional distress for violati of his due process rights.

Arguement - HRS 76-46 clearly and expressly states that no dismissal shall be effective for <u>any purpose</u> unless the ten

notice is given before the effective date thereof. The statute is supported by Hawaii Supreme Court rulings: Bugbee v. Med Dir Terr'l Hosp, 42 Haw 122, 124(1957); Re Appeal of Harper, 52 Haw 313,318,475 P. 2d 53(1970) .. ... the public employer "must bear the consequences of its failure to meet the requirements" of the statute even if there was good cause to te rminate no matter of a post-termination hearing finding. Thus under Hawaii law, reinsta tement is an absolute right of extreme importance to all Hawaii public employees and must be protected and honored by this court. The federal court must follow the law of Hawaii as determined by statute or decision of the Hawaii Supreme Court. Appellant believes that as a Hawaii resident subject to Hawaii law, he is entitled to equal treatment and equal protection under the constitution as any other Hawaii resident.

2. Point of fact or law overlooked in the decision:

(a) 42 U.S.C. Section 2000e-3, retaliation for filing a racial discrimination charge with

the EEOC (retaliatory discharge claim)

(b) Fifth and Fourteenth amendments to the U.S. Constitution, violation of the due process clauses (due process claim)

The two issues above were not raised in the appeal before this court because of a change in attorneys for appellant. Detail comments on these issues are contained in appellant's Proposed Post Trial Findings of Fact and Conclusions of Law and Order and appellant's Post Trial Brief which is incorporated here.

The Retaliatory Discharge Claim. At the trial, my supervisors werenot present to testify against me but the City introduced a huge amount of very old (many over 5 ye ars old) document alleging unsatisfactory work which was very difficult to sort out and understand. Unfortunately, my attorney did not object to the admission of these documents on the basis he could not cross-examine my supervisors and Judge Kay ruled that the City had proper cause to fire me. In appellants opinion, however, the district court's conclusion was not possible because (1) my

supe rvisor testified under oath that my work pe rformance was average when compared with the other auditors under his supervision, (2) during the last seven months of my employment, there were no complaints from my supervisor alleging unsatisfactory work performance except for the Parks assignment just before I was fired. The Parks job was, therefore, only a pretext used to fire me since there was not good cause to fire me because there were no unsatisfactory work performance complaints from my supervisor. Furthermore, appellant testified that before he was fired, his supe rvisor had warned him of it - retaliation.

The district court relied on the Arbitrator Decision, exhibits alleging unsatisfactory work submitted by the City, and the testimony of the personel officer (Carson) mainly to reach its decision. The arbitration decision should have been given no weight. Aleem v. General Felt Indus, 661 F 2d 135 (9th Cir 1981), cert denied 106 S Ct 54 (1985). The personel officer is not my supervisor or

an accountant so his testimony should be given little weight. The City exhibits are stale, irrelevent and it is not clear whether appellant work was really unsatisfactory since no expert witness testified as to each exhibit submitted. It should be noted that appellant qualified as a professional expert witness being a CPA who passed the examination w ith the highest test scores.

This court should also note my accusers credibility. They admit that for many years they falsified my annual job performance ratings; they knew I was doing personal business and took no disciplinary action; and they approved my time sheets and sick leave applications knowing that I was taking excessive and abusing my sick leave privileges. The City fired the wrong person it seems. I wad"railroaded."

The Due Process Claim. The district court found that appellant was terminated for good cause and that the results would not have been different if he had received pretermination notice and hearing. Appellant has

shown above that the so called good cause termination (unsatisfactory work performance) is merely a distortion of the evidence since it is inc onsistent with the overall facts of the case. My affidavit dated 1-3-89 filed in the Ninth Circuit also supports my position that had I been given a pretermination notice and hearing, before an independent person, I would not have been te rminated. In support of this, I submit that in 1973 when I was given a repremand for unsatisfactory work pe rformance, it was expunged from the records after a post reprimand hearing while I was still employed and the mistake was corrected (in this case I was not given a prereprimand notice or hearing). In my 1978 ten day suspension without pay, I was given neither a pre or post suspension notice or hearing. In my 1979 termination, I was not given a pretermination notice or hearing and Had I been given one before an independent person as in the 1973 above while I was still employed, the mistake would have been corrected. My post termination hearing, the arbitration,

was held 7½ years later and under Loudermill, 470 U.S. at 532 it was "constitutionally inviolative" because of the long delay, and in Hougue v. Clinton, 791 F. 2d 1313, 1326-29 (8th Cir 1984) the measure of damages is back pay from termination until post termination hearing. The opinion of this court as to the measure of damages appears to be in direct conflict with that of the court in the 8th Circuit and substantially affects a rule of nationally application in which there is an overriding need for national uniformity. In Zinermon v. Burch, 110 S. Ct 975,988 n. 19 (1990); termination was the actual injury, reinstatement the proper remedy for due process violation.

In conclusion, petitioner understands that this court did not review the entire case files since the exhibits and transcripts were not requested by this court and begs this court to do so in view of all the foregoing to prevent not an injustice but a great injustice. Strict and explicit application of HRS 76-46 under the facts and circumstances of

this case is warranted.

Wherefore, petitioner respectfully requests:

(1) That at least a rehearing of the appeal in the above-entitled cause be granted to prevent a great injustice; and

(2) That the honorable judges of this Court order that the above-entitled case be heard in banc.

Dated: March 30, 1992

signed Edgar H.W. Lum

U.S. Court of Appeals
For the Ninth Circuit

Edgar H.W. Lum,
Plaintiff-Appellant — No. 90-16452
v.
City & County of Honolulu,
Defendant-Appellee

Edgar H.W. Lum,
Plaintiff-Appellee — No. 90-16732
v.
City & County of Honolulu,
Defendant-Appellant

ADDENDUM TO PETITION FOR REHEARING SUGGESTING APPROPRIATENESS OF HEARING IN BANC

To the Honorable Judges of the U.S. Court of Appeals for the 9th Circuit: Petitioner Edgar Lum, the appellant above named, respectfully request that this addendum be considered because due to time limitations he could not find a good attorney and had only about a week to file the Petition and the recent discovery of new evidence, HRS 76-41 Performance ratings and rule 6.2(b) of the Personnel Manual of the City and County of Honolulu which is attached.

ISSUES PRESENTED

1. Was the $8,000 awarded by the district court for the due process violation for mental and emotional distress adequate in this

ase?

Petitioner strongly feels that it is ot adequate and any of the issues below or combination of them warrants reinstatement plus other damages.

A. HRS 76-46. As a matter of law, petitioner should be reinstated. The statute nd common law is as clear as you can get. The purpose of the law is to protect the small boys from politics and power of the big boys and this is becoming more and more critical in these times. The law requiring pretermination hearing helps to prevent errors, provides a meaningful time and place for a he aring and allows time to correct the violation before an almost irreversable adverse decision is made which a post termination c annot provide.

B. Penalty too severe. In Shelly v. State 539 P 2d 774, reinsta tement is the only proe r remedy when due process rights are violated and termination too severe a penalty. The penalty in this case should have been, if the c harges are correct, a demotion, tr-

ansfer[illegible] to another department, 20 days suspension without pay, etc. but obviously not termination. Furthermore, under HRS 76-46 and rule 6.2(c) of the Personel Manual of the City & County of Honolulu, I should have been denied my annual increment if my performance at work was unsatisfactory.

C. Double and/or triple jeopardy. On Nov. 27, 1978, I was suspended for 10 days without pay (Dx 24) for unsatisfactory job performance and excessive use of sick leave. And again on July 18, 1979, I was suspended for 10 days without py and terminated for the same reasons. Why was the suspension in 1979 necessary?

D. Long delay. It took over 10 years to hear my Title 7 claim. Uner Loudermill, 470 U.S. at 532, this is "constitutionally inviolative" on its face because it took too long and the remedy should be reinstatement.

E. Retaliation. During my 12 year employment with the City, I received all satisfactory job performance ratings annually, all my weekly time sheets and sick leave applications were approved. On May 11, 1979,

I filed a Title 7 claim. Before I was fired, my supervisor told me "they going to fire you" and I was fired on July 18, 1979 for taking excessive sick leave and unsatisfactory w ork performance.

In 1973, I took 72 days sick leave and in 1977 I took 152 days sick leave (Dx 30) and applied for workmen's compensation for these periods which was granted by the state. Sta te laws say that you c annot fire someone for a work related injury, so the charge of excessive sick leave is void. Furthermore, I took only 2 days sick le ave during the last 8 months of my employment (Dx 55 pg 9) which on its face is not excessive. The City's charge of excessive sick leave, therefore, is a pretext and outrage and is not supported.

The City contends that my work performance was unsatisfactory during my 12 years employment. This is not true. I received satisfactory job performance ratings annually and this is almost insurmountable, and was not overcome at trial. An examination of the City's exhibits show that in 1972-73, there

was about 9 examples of unsatisfactory work performance which was later expunged and about one each for the yea rs 1970, 1971, 1976, 1978, and 1979. There were no examples of unsatisf actory work performance for 6 years - 1967, 1968, 1969, 1974, 1975, and 1977. This falls far short of overcoming the annual satisfactory job performance reports I received. Furthermore, Mr. Oka, my supervisor and Chief Accountant for the City testified that my performance at work was "average" when compared with the other accountants under his supervison (Dx53,p941,124).

In view of the above, little or no credence can be given to the City's charges of excessive sick lea ve and unsatisfactory work performance. Under Yartzoff v. Thomas, 809 F 2d 1371 (9th Cir 1987) satisfactory job performance rating is evidence of pretext of firing. The fact tha t the City took 12 years to fire me and the firing came only 2 months afte r I filed a Title 7 claim supports my claim also that the City's reasons for firing me was pretextual and I

was a victim of retaliation. Under Yartzoff, "The plaintiff may succeed either directly by persuading the court tha t a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." The City's failure to comply with HRS 76-41 and Rule 6 ofthe City's Personel Manual is further evidence that the reason proffered for my dismissal is pretextual.

F. Mitigating circumstances. Under McGhee v. Draper, 639 F 2d 639, 646 (10th Cir 1981) reinsta tement is the proper remedy if there was mitigating circumstances against termination. Besides what is already on the record, some mitigating circumstances are (1) Prior to City employment, I had no prior history of unsatisfadtory job performance or taking excessive sick leave, (2) I was told by my peers that "you one CPA and don't need this job and you already making too much money," (3) I was a victim of disparate treatment and discrimination (Px 2) which should have been investigated because there were 2 other

people in the office with similar sick leave records, there were numerous examples of unsatisfactory work performance by other accountants in the office, etc. and no dicisplinary action was taken, (5) I was not given enought work to do and wrote the Civil Service Director a letter about it, (6) vital records of my alleged unsatisfactory job performance was not kept because it was pretextual, i.e. there was no chronological list of unsatisfactory job performance or documentation of any of the alleged 300 meetings with Mr. Carson and (7) the series of warning letters dated 12/21/78, 12/29/78, 1/22/79, 1/30/79 and 2/5/79 from Mr. Carson regarding my time sheets weekly was not examples of unsatisfactory job performance. If Mr. Carson talked to me before writing those warning letters, I would have told him that I have kept time sheets this way for the last ten years, my supervisor told me it was okay to continue to keep time sheets this way, and time charged to general office overhead account for coffee breaks, attending

meetings and conferences, reading City memos and circulars, filing in time sheets, going to the restroom, etc. cannot be considered use of government time for my personal business. I was told by the Civil Service department that these warning letters were not grievable because they were not disciplinary in nature.

G. Liberty rights. The record below shows that I was stigmatized and deprived of my of my liberty rights. Reinstatement is the proper remedy for deprivation of property and liberty interest. Under Wellner v. Minnesota State College, 487 F 2d 1953, 1957 (8th Cir 1973), back pay unti a hearing is held was the relief for deprivation of liberty interest. Having a post termination hearing could not adequately reflect active circumstances surrounding the termination.

H. Mental and emotional distress. The award of $8,000 for mental and emotional distress for due process violation is grossly inadequate. Since the loss of my job which was my livelihood and chosen profession was

the most important thing to me, it could be compared to someone losing his wife or child. I was not suffering from mental and emotional distress as a result of my relationship with my family members and the district court should not have used this to reduce the amount of damages.

I. Punative damages. Based on the record, the City's conduct was outrageous and punative damages should be awarded to discourage this kind of behavior.

J. Clearly erroneous. Based on the record, the district court's decision was clearly erroneous. In firing me, the City put too much weight on my sickleave record.

2. DID PETITIONER GET A FAIR TRIAL?

I do not feel that I got a fair trial. One reason is because the attorney that represented me at the arbitration had a conflict of interest. He represented the union and not me and could not zealously prosecute my case because my supervisors were in the same union as me. For this reason, the arbitration decision should not have been admitted as evidence or should have been given little

or no weight instead of the great weight it was given. I was entitled to a de novo trial. Under Aleem v. General Felt Industries Inc, 661 F 2d 135 (9th Cir 1981) Cert denied 106 S Ct 54 (1885), this court said that Title 7 claims are independent actions and the arbitration decision should be given no weight.

CONCLUSION

Besides what is already on record, the City's action is outrageous because (1)they knew that the excessive use of sick leave charge was a pretext used to justify my termination since I took only 2 days sick leave during the last eight months of my employment with the City and most of the other sick leave days taken was covered under workmen's compensation, (2) they knew or should have known that the charge of unsatisfactory work performance was also a pretext to justfy my termination since NRS 76-41 and Rule 6 of the City's Personel Manuel sta tes that whenever my performance is unsatisfactory, The City must notify me of it so that I am given an opportunity to correct it immediately, not

ten years later and (3) I was not warned verbally of unsatisfactory job performance so that I would have a chance to correct it before formal written disciplinary action was taken in 1972-73 (written reprimand), Nov 1978 (10 day suspension without pay), and July 1979 (10 day suspension without pay followed by termination).

In theory at least, everyone is entitled to liberty and justice. We are supposed to be a nation of laws not men. I was jerked around and railroaded and there was a malfunction in the judicial process. I hope that the system of checks and balance will work and as an alternative to a rehearing if this case and/or an investigation, I pray that this court will end this sad and unfortunate case by giving me the following relief: (1)Reinstatement with back pay plus interest and cost, (2)$250,000 for mental and emotional distress, and (3) $250,000 for punative damages. Please check the record below. My life is at stake. You will be shocked at what they did.

Dated: May 26, 1992 and signed by Petitioner

PERSONEL MANUAL CITY AND COUNTY OF HONOLULU

Rule 6. Uniform Performance Evaluation System

6.1 Preparation

In accordance with the system prescribed or approved by the Director, and to meet the the objectives that each employee may be commended for work deserving recognition and may be afforded an opportunity for correcting any weaknesses, each appointing authority shall have the performance of each employee evaluated as follows:

a. Probationary employees shall be evaluated in writing at end of every three months during the probationary period including any extension thereof. A performance evaluation may not be required when an employee is terminated prior to the completion of the three months or prior to the completion of the probationary period

b. Employees having permanent appointments shall be evaluated at least once before the end of every twelve months of service.

6.2 Review of Regular Employee's Performance Evaluation

a. It shall be the duty of each appointing authority or designated representative to review the performance evaluation of each employee under the appointing authority's jurisdiction with the employee

b. The appointing authority or designated representative shall inform employees in writingwhenever their performance in theposition is substandard. Employees shall be notified, in such notice and from time to time thereafter as may be necessary, of the manner in which their performance is substandard.

c. An Employee with continued substandard performance for a period of three months

after a written notice is givensuch employee may be used as the basis for denying an increment. Employees who have been denied an increment may be subsequently granted the increment whenever their work performance have been brought up to standard and have so continued for any three-month period. The denial of any increment shall be a subject for grievance procedures. No action taken under this subsection shall change or in any way affect the employee's service anniversary date.

6.3 Filing

a. A copy of the performance evaluation report of employees serving initial and new probationary periods shall be provided to the employee.

When an employee's services have been evaluated as being substandard, a copy of the performance evaluation report and any other written report to the employee shall be sent to the Director.

b. A copy of the performance evaluation report of employees with regular appointment shall be provided the employees. When an employee's services have been evaluated as being substandard for purposes of denying an increment or longevity step increases, a copy of the performance evaluation report or other written report to the employee setting forth the specific reasons for the substandard evaluation shall be sent to the Director.

United States Court of Appeals
For the 9th District

Edgar H.W. Lum,
Plaintiff-Appellant No. 90-16452
v.
City & County of Honolulu,
Defendant-Appellee

Edgar H.W. Lum,
Plaintiff-Appellee No. 90-16752
v.
City & County of Honolulu,
Defendant-Appellant

To the Honorable Judges of the U.S. Court of Appeals for the 9th Circuit: Petitioner Edgar H.W. Lum, the appellant above named, respectfully suggests that the above-entitled proceeding is appriate for consideration by all the judges of this court convened in banc because there was a malfunction of the judicial process. Extrodinary relief in this bizarre case is warranted to protect and maintain the interity and public confidence in the judicial process. As a result, adverse action was taken against me and I did not get a fair trial.

1. Attached for the record is the Decision of the Labor Appeals Board dated Jan. 15, 1982 approving my workers compen-

sation claim. This voids the City charge of use of excessive leave.

2. On Sept. 8, 1978, I filed a workers compensation claim and two months later in Nov 1978, I was suspended for ten days without pay. The record below shows that at that time, I did not receive a detail list supporting the charge of unsatisfactory work performance, was not given a pre or post disciplinary hearing and was not notified in writing that my performance was unsatisfactory as required by HRS 76-41. The suspension was in retaliation for filing a workers compensation claim and the charges were pretextual.

3. On May 11, 1979, I filed a Title 7 claim and two months later, I was suspended for ten days without pay and fired on July 18, 1979. The record below shows that at that time, I did not receive a detail list supporting the charge of unsatisfactory work performance and excessive use of sick leave, was not given a pre or post disciplinary hearing and was not notified in writing

that my performance was unsatisfactory as required by HRS 76-41. The suspension and dismissal was in retaliation for filing a Title 7 claim and the charges were pretextual.

4. The City admits I had no unsatisfactory work pe rformance complaints From Feb 1979 to July 1979, a period of six months except for the Parks job. T 7-20-90; P II 82 l 23-25; P II 83 l l-18.

5. The Chief Accountant, Mr Oka, my supervisor testified under oath that my job performance was satisfactory when compared to the other accountants in the division.

6. All my time sheets were approved weekly and I received satisfactory job performance ratings annually for twelve years

7. An impartial measure of work performance is quantity and quality of work. The record below shows that there was no detail list of work deadlines I missed and my supervisor testified under oath that I did not miss any work deadlines. The City charge of non-production, therefore, is not objectively supported and if there was any, my

supervisor
should have been disciplined for inadequate supervision.

The record below shows that almost all the complaints came after I completed the job (for example, see Parks job assigned on 4-18-79, first complaint came after job comleted on 6-7-79. AD Excerpts of R p 99. Supervision was too late and too little. The City charge of unsatisfactory work performance therefore, is not supported and if there was any, my supervisor should have been disciplined for inadequate supervision. Moreover, work performance below your grade level should be punished by a demotion, not dismissal.

8. The City evidence of unsatisfactory work performance is hearsy based on a subjective opinion by my supervisor and is not supported by impartial expert witness or evidence.

9. Mr. Oka, my supervisor was not present at the arbitration and district court hearings and I was not able to cross examine hi

10. The arbitrator found that my su-

periors' work performance was unsatisfactory: (a) the termination letter was poorly crafted, (b) the excessive sick leave charge was not supported, (c) they took too long to fire me in view of the unsatisfactory work performance complaints, (d) they denied me d ue process, (e) they made "phony" job performance reports, etc.

11. The arbitrator was not impartial because he (1) overlooked the more serious violations above by my superiors where no disciplinary action was taken against them, (2) described me as a "lone wolf manifesting a number of socially unattractive traits and behavior ....", (3) did not follow the law with respect to HRS 76-46, HRS 76-45, HRS 76-41, (4) did not mention that there was no unsatisfactory work performance complaints against me for six months prior to my te rmination. The arbitrator should also have said the work was unsatisfactory because it is elementary that (1) written records of the over 300 meetings with Mr. Carson should have been kept and (2) a written

report of the C.P.A. review work records should have been made and I should have been given the opportunity to answer the charges and to cross examine him.

12. The district court judge also was not impartial because (a) he sa id the arbitrator was very competent (D Exc of R p27) and at one hearing praised the arbitrator so much that my attorney told me that if he admits the arbitra tion decision in as evidence we lose, (b) he said "I've read the whole arbitra tion ...." T-1, p112, l 16 before it was introduced into evidence, (c) he stayed the trial until the Hawaii Supreme Court ruled on the finalty of the arbitration decision before it could be submitted into evidence. Note that in the hearing before visiting Judge Russel Smith, the motion to stay the trial by the City was denied (T 2-2-88, p7, l 11-19) under Cooper v Morris, 464 Fed 2nd and section 2000 E 5 which specifically provides that this type of case should be expedited, and (d) his cross examination was not impartial. This court said

that the trial below was stayed pending resolution of a grievance under an agreement between Lum's union and the City is incorrect. The union is not a party to this suit.

13. I believe that this Court should render an opinion whether the City violated HRS 76-46 because if this court rules in my favor, a trial would not have been necessary. In Wilson Arlington Co v. Prudential Ins. Co, 912 F 2d 366 (9th Cir 1990) this court reversed a judgement entered after trial beca use a summary judgement should have been given for the plaintiff. In citing the Thorba case, this court overlooked the fact that the rules governing the employment of teachers under contract and permanent civil service emoloyees in collective bargaining unit #13 are different and they are cove red under different sections of the law. The Harper case I cited seems more direct and comparable since we were in the same union and the same laws would be applicable.

(14) In a hearing before Judge Kay (T 6-27-89, p27. l 2-25)), it was pointed out

that the ninth circuit and Supreme Court repeadly held that the appropriate remedy for deprivation of liberty and/or property interest without due process is to order the process that was due and any attendant damages which directly resulted from the failure to give the proper procedure. And in Loudermill, the Supreme Court said due process can be violated where the procedures take too long, where your post termination hearing just takes too long and that's what happened in this case; that's why we're saying the damages would be inadequate; that's why if we turn to state cases, they clearly say that a public employee who is not given these rights must be reinstated.

15. The President of unit 13, my collective bargaining unit told me my case comes before the board a lot and " everything stacked against you and you the sacraficial lamb."

16. Evan Shirley who represented me on the appeal to this court told me "Those bastards. They glossed over the records, they support each other and going blame

each other. Mr. Jenner who represented me at the trial should have objected to the evidence where he could not cross examine the author, filed a motion on summary judgement on MRS 76-46 and a motion to exclude all evidence prior to Nov 1978, examination and cross examination were weak, etc." He wanted to withdraw but I wouldn't let him because I already paid him in full and I knew I couldn't find anyone to take this bizarre case.

For the record, the case record at the district court was not available for the past two months and the files returned to me was incomplete. I am still looking for a good attorney to handle this unpopular case. This case was really about a power far greater then mine.

My understanding is that this court has great latitude and power to correct an unjust result.

Wherefore, Petitioner respectfully request that this court grant petitioner whatever relief it deems just and proper under the

circumstances:

1. Summary judgement for petitioner under RAS 76-46

2. Summary judgement for petitioner under RAS 76-41 because the City should be estopped from presenting evidence of unsatisfactory work performance since they did not comply with the law

3. Summary judgement for petitioner under Brady v. Gebbie, 59 F 2d 1143 (9th Cir 1981) and Loudermill since the post termination hearing took too long

4. Rehearing or rehearing in banc since I did not get a fair trial and there was a malfunction ofthe judicial process which mus t be corrected by this court to protect and maintain the integrity and public confidence in the judicial process.

Dated: July 31, 1992.

Signed: Edgar H.W. Lum

SECOND PETITION FOR REHEARING SUGGESTING APPROPRIATENESS OF HEARING IN BANC

Labor and Industrial Relations Appeals Board
State of Hawaii

Edgar H.W. Lum,
Claimant-Appellant,
v.
City & County of Honolulu,
Department of Finance,
Employer-Appellee,
Self-Insured

Case No. AB 78-305;
AB 79-248

(2-70-07136;
2-78-27000
through
2-78-27016)

DECISION AND ORDER

These workers' compensation cases are before the Board on appeal by Claimant Edgar Lum from decisions of the Director of Labor and Industrial Relations dated Aug 8, 1978 and Aug 10, 1979.

The decisions in question barred claims filed by Mr. Lum for injuries in 1973, 1977 and 1978 on the grounds that the two year statute of limitations set forth in Section 386-82 barred an award of compensation.

The issues in dispute are:

1. Whether the statute of limitations set forth in Section 386-82 bars Claimant's claims for certain injuries in 1973, 1977 and 1978; and

2. Whether these injuries arose out of and in the course of Claimant's employment

by the City and County of Honolulu.

FINDINGS OF FACT

1. Claimant is a forty-three year old Internal Control Analyst who was employed by the Department of Finance, City and County of Honolulu, between 1968 and sometime in 1973.

2. During 1973, Claimant experienced conflicts with Arnesthara, his immediate supervisor at the Department of Finance, and Alexander Oka, the division chief. Claimant was remanded for unsatisfactory job performance and was asked to resign. As a result, he grew alarmed and insecure. In March of 1973, Claimant saw his internist, Dr. Bernard Fong, complaining of blacking out spells, inability to concentrate, memory loss and feelings of anxiety with headaches, nausea and abdominal pain. Dr. Fong reffered Claimant to Dr. Stanford Au, a neurologist. On March 15, 1973, Dr. Au reported that Claimants' neurological examination was normal but that he was suffering from anxiety in reaction to the tensions and conflicts of his work at the City and County.

3. On July 17, 1973, Bill Gonsalves, a union agent for the Hawaii Government Employees Association, on behalf of Claimant, directed a letter to the Director of the Department of Civil Service of the City and County of Honolulu requesting that sick leave taken by Claimant between April 6, 1973 and May 31, 1973, and between June 5, 1973 and July 15, 1973 be charged to disability under the workers's compensation law. Mr Gonsalves' letter made it plain that Claimant contended that he suffered disability due to emotional problems originating on the job.

4. As a result of Mr Gonsalves' letter dated July 17, 1973 and other discussions, Claimant was referred to Dr. H. Charagozlou Hamadani, a staff psychiatrist at the Diamond Head Mental Health Center retained by the City and County of Honolulu for the purpose of examining Claimant. On Sept 11, 1973, Dr. Hamadani reported that although he could not establish a cause and effect relationship between Claimant's work and his depression, Claimant's work situation appeared to be an aggravating factor.

5.During the years 1974, 1975 and 1976, Claimant's emotional problems and depression subsided because of decreased pressures. Claimant did not seek the service of a physician for his problems between late 1973 and February, 1977.

6. During 1977 Claimant experienced increased presure and difficulty with his supervisors at work. His headaches, nausea, abdominal pain, memory loss and inability to concentrate returned. Throughout 1977 Claimant incurred approximately 152 days of sick leave for these symptoms. His supervisors believed that he was tardy in his work, devoted time to personal matters not related to work, and otherwise was malingering. On Nov 27, 1977, Claimant was suspended for ten days, ostensibly for abuse of sick leave, work time and malingering. Claimant grieved the suspension but was subsequently discharged.

7. On Feb 16, 1977, Claimant again returned to Dr. Fong and continued treatment under Dr. Fong until March 21, 1978.

On May 12, 1978, Dr. Fong reported that Claimant suffered an acute anxiety neurosis causally related to personality clashes he experienced at work. Dr. Fong further reported that the episodes of mental illness suffered by Claimant in 1973 and in 1977 were separate and distinct. The Board credits this opinion.

8. On April 27, 1978, Claimant filed a claim for workmen's compensation for an alleged injury sustained on Feb 27, 1973. On Sept 8, 1978, he filed filed claims for injuries sustained at the following times during 1973, 1977 and 1978:

Case Number	Date of Accident
2-78-27000	03/09/73
2-78-27001	04/02/73
2-78-27002	04/06/73
2-78-27003	06/05/73
2-78-27004	01/18/77
2-78-27005	01/28/77
2-78-27006	02/04/77
2-78-27007	02/16/77
2-78-27008	05/19/77
2-78-27009	05/20/77
2-78-27010	05/23/77
2-78-27011	07/15/77
2-78-27012	08/15/77
2-78-27013	09/29/77
2-78-27014	11/16/77
2-78-27015	12/06/77
2-78-27016	02/02/78

9. Employer City and County of Honolulu did not file an Employer's Report of Injury in accordance with Section 386-95 until April 4, 1978 and December 14, 1978.

CONCLUSIONS OF LAW

1. None of the claims filed by Claimant for work injuries sustained in 1973, 1977 and 1978 is barred by Section 386-82, Hawaii Revised Statutes. It is plain, of course, that the claim filed on Sept 8, 1978 for injuries between Jan 1977 and Feb 1978 was well within the two year period of limitations. The Director considered that the 1977 and 1978 injuries were a natural outgrowth or "reoccurrence" of Claimant's 1973 problems. This conclusion, however, is contrary to the medical evidence on the question presently before the Board and ignores the lengthy period between 1973 and 1977 when Claimant was free of symptoms. The principle difficulty in this case has been whether the statute of limitations bars Claimant's claims filed in April and Sept of 1978 for injuries sustained in 1973. It is apparent

that Claimant's representative afforded his employer written notice of these injuries and of his contention that they were work related in a letter dated July 17, 1973. Further, the employer referred Claimant to its physician for his opinion on this question. Despite these events, employer failed to report the injury as required by Section 386-95. Had the employer filed a Report of Injury in accordance with that Section, a hearing would have been held by the Director. In these circumsta nces, we conclude that the employer is estopped from asserting the statutory bar with respect to the 1973 injury. Quirino Baclaan vs. Honolulu Airport Services, Case No. AB 79-307, Sept 2, 1981; Dependents of Yaeko Fukuhara vs. Orchids of Hawaii, Case No. AB 76-9(H) (1977).

2. Claimant's injuries sustained during 1973 and 1977 for which claims were filed on on April 27, 1978 and Sept 8, 1978 arouse out of and in the course of his employment with the City and County of Honolulu. It is abundantly apparent here that the reports

of Drs. Hamadani, Fong and Au to some degree did support the Claimant's contention that his emotional problems were work related. In any event, it is plain that employer has failed to overcome the presumption of Section 386-85(1) that the Claimant's claims are for covered work injuries.

ORDER

The decision on appeal are reversed and both proceedings are remanded to the Director of Labor and Industrial Relations for determination of those disabilities, if any, which resulted from Claimant's work injuries.

Dated: Honolulu, Hawaii, Jan 15, 1982

Signed: E. John McConnell, Chairman

Concur: Yukio Takemoto, Member

James H. Takushi, Member

U.S. COURT OF APPEALS
FOR THE 9th CIRCUIT
121 Spear St., P.O. Box 193939
San Francisco, CA 94105-3939

Aug 4, 1992

To: Edgar Lum

From: Cathy A. Catterson, Clerk
By: Donna Gilmour, Deputy Clerk

Subject: Defective Petition for Rehearing

Re: CA No. 90-16452 Lum v City & County of
90-16732 Lum v. City of Honolulu

A petition for rehearing in the referenced case was received on 8/3/92 and could not be filed for the following reason(s):

(x) The petition was received late and the mandate has been issued. A motion to recall the mandate must be submitted.

U.S. Court of Appeals
For the 9th Circuit

Edgar H.W. Lum,
Plaintiff-Appellant — No. 90-16452
v.
City and County of Honolulu,
Defendant-Appellant

Edgar H.W. Lum,
Plaintiff-Appellee — No. 90-16752
v.
City and County of Honolulu,
Defendant-Appellant

EX PARTE MOTION TO RECALL THE MANDATE

Edgar H.W. Lum, the above named Petitioner, respectfully moves that the mandate in the above entitled appeal be recalled.

As grounds for this motion, the Petitioner shows the following:

1. The mandate was filed and entered on June 15, 1992

2. The mandate should be recalled to prevent a great injustice

3. The necessity for recalling the mandate is to allow this Court to consider the second petition for rehearing suggesting appropriateness of hearing in banc filed by Petitioner on July 31, 1992 and received by this Court on Aug. 3, 1992.

Wherefore, Petitioner respectfully requests that this motion be granted.

Dated: Aug 12, 1992

Signed: Edgar H.W. Lum

U.S. Court of Appeals
For the 9th Circuit

Edgar H.W. Lum,
Plaintiff-Appellant — No. 90-16452

v.

City & County of Honolulu,
Defendant-Appellee

Edgar H.W. Lum,
Plaintiff-Appellee — No. 90-16732

v.

City & County of Honolulu,
Defendant-Appellant

Third Petition For Rehea ring Suggesting Appropriateness of Hearing In Banc

To the Honorable Judges of the U.S. Court of Appeals for the 9th Circuit: Edgar H.W. Lum, the appellant above named, respectfully suggests that the above entitled proceeding is appropriate for consideration by all the judges of this court convened in banc because there was a malfunction of the judicial process and as a result, I did not get a fair trial. Extrodinary relief in this bizarre case is warranted to prevent and injustice and to protect and mainta in the integrity and public confidence in the judicial process and the reputation of this court.

1. I want to thank this court for giving me the opportunity to tell my side of the story.

2. The judicial process in Hawaii is on trial in this discrimination case. Now that it has gone full circle, I can tell you what happened. It has been a nightmare for me and hard to stomach.

3. This court has the power and latitude to correct an unjust result and I pray that it will sua sponte.

4. This case is an excellent example orchestrated by the "old boy network" looking out for their own self interest with a power far greater than mine.

6. The information that I gave this court was not presented at the arbitration and trial below which would have resulted in a summary judgement in both cases.

7. Arlie Carson told me he didn't make an investigation and written report of my dismissal because "it was premeditated."

8. Charles Khim, the union attorney told me " a trained monkey could have won this one" and it was obvious that the City

"fine-toothed combined my work record to find anything they could use against me inthe arbitration, Rodney Veary, the trial attorney below told me "as a result of Bert Lau (the City attorney for the arbitration) the City has 42 cases of material stored away."

9. My disciplinary record shows that I only had a 10 day suspension without pay in Nov 1978 and was dismissed in July 1979, both for the same reasons - excessive use of sick leave and unsatisfactory work performance. Since there were no specific dates and detail list given to me at time the action was taken by the City, the charges were not supported.

10. The arbitration was a shibai. The arbitrator was not impartial because he did not comply with HRS 76-46 and HRS 76-41 and did not mention that there was no unsatisfactory work complaints for the six months preceeding my dismissal except for the Park job, which the City (Veary) admits, in his his decision since this would contradict the

conclusions of the arbitration decision. I should have gotten a summary judgement but the longer the arbitration went the more pay the arbitrator and union attorney got. My understanding is that the arbitrator got $40,000 for his work.

11. The union attorney had a conflict of interest and couldn't say that my superior's work was unsatisfactory and they should have been fired instead of me. He deserted me at the arbitration.

12. William Jenner, my trial attorney below said they went laughing up their collective sleeve after they ga ve me onemonth pay in the arbitration. Before the trial, my attorney told me we had a "slam dunk" case. I lost him at the trial. I believe he should have presented what are in these petitions. He deserted me too on the day of the trial.

13. The district court judge was not impartial because in his decision, he did not say that during the last 8 months of my employment, I only took 2 days sick

leave and there was no unsatisfactory work performance complaints against me except for the Parks job since this does not support his desicion. The judge also said my testimony was not credible but ga ve full crdibility to my superiors whose work performance was unsatisfactory per the arbitrator and the record on the whole.

14. After Evan Shirley told me "Those bastards, they glossed over the records, they going blame each other and support each other ...." and wanted to withdraw from the case and I wouldn't allow him, I believe I lost him. I think he should have presented to this court what I did. This is what he got paid for.

15. I checked the district court records recently and found that Mr. Jenner was paid $9,100 for attorney fees which the City did not appeal although the the City did appeal the $8,000 award to me. The court awarded me attorneys fee. My attorney agreed to work for 25% contingency fee. This doesn't sound right to me.

16. My understanding is that all the attorneys are officers of the court and they must comply with ethical and professional standards. I don't think they did in this case.

17. I belive there was an obstruction of justice in this case and there is common knowledge in this small town that I was jerked around and rairoaded and things were "stacked against me and I was the sacrificial lamb."

18. This court has the power and latitude to correct an unjust result and I pray that it will sua sponte.

19. For the record, I hereby incorporate into this petition my petitions for rehearing dated March 30, 1992, May 26, 1992, July 31, 1992 to this court so that I can attest to its truthfullness in the affidavit below.

Dated: Sept. 1, 1992

Signed: Edgar H.W. Lum, Pro Se

Affidavit below signed by nota ry public/Lum

Affiant being first duly sworn on oath deposes and says that he had read the foregoing, knows its contents and that the statements contained herein are true to the best of his knowledge and belief.

U.S. Court of Appeals
For the 9th Circuit

Edgar H.W. LUM,
Plaintiff-Appellant — No. 90-16472

v.

City & County of Honolulu,
Defendant-Appellee

Edgar H.W. Lum,
Plaintiff-Appellee — No. 90-16732

v.

City & County of Honolulu,
Defendant-Appellant

ORDER

Before: Goodwin, Farris and Poole, Circuit Judges

The motion to recall the mandate is denied.

The Clerk of the Court is instructed to accept no further filings from Mr. Lum regarding this matter.

SUPPLEMENT

Fifth Amendment, U.S. Constitution ... 1s

Fourteenth Amendment, U.S. Constitution 1s

U.S.C. ..... 1, 2, & 3s

HRS 76-41 ..... 3s

Excerpts And Exhibits From The Trial Below

Petitioner's job performance "average" per Mr. Oka 4s

The City admits there was no unsatisfactory job pe rformance during last six months 4s

Weekly time sheets approved by Petitioner's supervisor ... 4, 5, & 7s

1972-73 job performance marked "below requirements" expunged 7s

Petitioner took only 2 da ys sick lea ve in last 8 months of employment 7s

City's motive for dismissal 8s

Evidence of retaliation and pretextualness 9s

What process was due 9s

Summary judgment was due 8s

Pre vs. Post termination hearing 11s

Explanation of City's chargeof unsatisfactory work performance 12s

Fifth Amendment, U.S. Constitution

No person .....; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ..... nor be deprived of life, liberty, or property, without due process of law;

Fourteenth Amendment, U.S. Constitution

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42-U.S.C. #1983. Every person who, under color or any statue, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects or ca uses to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28-U.S.C. #1331(a). The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28-U.S.C. #2101(c). Any other appea l or any writ of certrorari intended to bring any judgement or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgement or decree.

28-U.S.C. #1254. Cases in the courts of appe al may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree.

42-U.S.C. #2000e-3. (a) It shall be unlawful employment practice for an employer to discriminate aga inst any of his employees ..... or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

MRS 76-41 Performance Ratings

There shall be established and maintained a system of performance ratings for the purpose of appraising the service of employees in the civil service and improving the employees performance.

The department head shall inform an employee in writing whenever the employee's performance in the employee's position is substandard. The employee shall also be notified in the notice from time to time thereafter as may be necessary, of the manner in which the employee's performance is substandard. Continued substandard performance for a period of three months after the written notice may be used as the basis for denying any step increment.

Petitioner's job performance "average" per Mr. Oka, Chief Accountant. Defendant's Exhibit 53, pg. 941, line 24.

Q. Okay, as far as your opinion is concerned, or even was concerned during the time period that Edgar Lum worked in your division, how did he compare as far as job performance and et cetera with other analysts under you?

A. I would say about average.

Q. About average?

A. Yes.

The City admits I had no unsatisfactory work performance complaints from Feb. 1979 to July 1979 a period of about six months except for the Parks job. Transcript of Hearing 7-20-90, pg. II-82, Line 23

The Court: Well, on that score, it appears, and refresh my memory if I'm incorrect, but that you introduced a number of documents up through Feb. of '79 that showed certain concern about Mr. Lum's performance in one way or another; and then there are only really two events subsequent to that, up to the time of his dismissal in July of '79. There's the filing of the EEOC claim in May of '79, and then there is the parks storeroom incident, the so-called last straw incident, in July '79.

Did anything else happen in that period of time?

Mr. Veary: No. When you say did anything else happen, I mean, were there any acts or disciplinary measures taken against Edgar?

The Court: Right, in the record, that we have in eivdence during that period of time, any incident or .....

Mr. Veary: No, your Honor.

Mr. Carson's 5 warning letters dated 12/21/78, 12/29/78, 1/22/79, 1/30/79 and 2/5/79 regarding my weekly time sheets which were approved by my supervisors so this would make it 8 months (from Nov 1978 to July 1979) that there were no unsatisfactory work complaints agaisnt me from my supervisor

1. Plaintiff Exhibit 10. below

Dec. 26, 1978

To: Edgar Lum
From: E.T. Hara
Subject: Preparation of Weekly Timesheets

Per your request that I put this instruction down in writing:

For the present, please continue to prepare yourtime sheets in the same manner as which you have done so in the past, e.g. show actual hours spent on projects. Time spent for coffee breaks, preparing timesheets, reading circulars, inter-departmental memos, promotion notices, vacant position notices, etc. are to be included in "office" category. You may show them individually if you so desire to account for the toal "office" category. Time spent on HGEA work as ste-

ward, or attending HGEA meetings, etc. are to be shown separately as required.

Signed: E.T. Hara
Internal Control Analyst LV

cc: Arlie Carson

2. Plaintiff Exhibit 12 below:

Jan 30, 1979

To: Edgar Lum, Internal Control Analyst II
From: Arlie Carson, Executive Assistant
Subjec t: Weekly Time Report (Week Ending Jan 19, 1979)

I am continuing to review your work record and have before me your time report for the week ending Jan 19. 1979. Again I find that you are utilizing regular working hours to accomplish personal business or are just idling away production time.

Of the 16 hours available to you in the work week, your work record was indicated thusly: Audits 12 hours, Grievance i hour, and General Office 3 hours.

I seriously question the 1 hour spent on grievance, because there was not a hearing on any subject matter that you are involved in at the present.

Secondly, the three hours given as general office is completely and wholly unacceptable. Working only 6½ hours a day is not considered satisfactory performance.

I caution you again that unless substantially all of your work time is spent on production of City assignment, disciplinary action may be taken against you up to and including dismissal.

Signed: Arlie Carson

Jan 30, 1979
Edgar Lum came in to discuss this memo and I advised him to ignore this memo and not to let it upset him. I advised him that the best solution to all the problems is for him to start producing.
Signed: Mr. Oka

Defendant's Exhibit 3. shows that I charged a substantial amount of time to "general office" time because I did not have any assignments and my supervisor knew this because all my time sheets were approved weekly. If I was non-productive, therefore, my supervisor should have been disciplined for not giving me any work to do.

Defendant's exhibit 3 shows: (time sheet)

For the week ending	Examinee	Explanation	Hours
1-29-71	Office	No assignment	16
2-5-71	"	"	40
2-12-71	"	"	40
2-19-71	"	"	32
2-26-71	"	"	28
3-5-71	"	"	31
3-26-71	"	"	4
4-2-71	"	"	28

Defendant's Exhibit 55, the Arbitration Decision and Award

1. On page 2, paragraph 3 under Background Facts, states ".. 1972-73 JPR (job performance rating) marked "below requirements" which was grieved by the union and eventually expunged by mutual consent."

2. On page 9, under 4. Double Jeopardy. "The record shows that Grievant had used two days of sick leave between Nov 1978 up to his discharge."

Why didn't my supervisor give me enough work to do and file away some of the work I did? Politics - cover-up. In my Parks report, for example, I reported that the records were not complete and up to date and the laws were not being followed. This meant taxpayers assets were not safeguarded.

The City's motive for firing me

I filed an EEOCcomplaint because of disparate treatment and I was not promoted sinc e I came to the City for about 11 years even though I applied for and was qualified for about 20 position vacancies. It was obvious that the City either had to promote me or fire me to prevent me from filing EEOCcomplaints.

Why a summary judgment should have been made

All my weekly time sheets and sick leave applicaations were approved; I received satisfactory job performance ratings annually; I did not receive ten days written notice before the effective date of termination as required by HRS 76-46; Except in 1972-73, I did not recieve written notice from the Director notifying me that my perforamce was unsatisfatory and I had three months to correct the violation as required by HRS 76-41; Mr. Oka, the division chief testified under oath that my performance was average when compared to the others; During the last 8 months of my employment

from Nov 1978 to July 1979, I took only tw o days sick leave and there were no complaints of unsatisfactory work performance from my supervisor except for the Parks assignment.

Evidence of Retaliation for filing EEOC claim and the reasons given by the City was pretextual

My direct testimony under oath that Mr. Oka told me so; I was fired two months after I file the EEOC cliam; The penalty was too severe in view of my disciplinary record; I rec eived satisfactory job performance ratings annually; From 1974 to July 1979, I did not receive any notice from the Director that my performance was unsatisfactory as required by HRS 76-41; and the Parks assignment was not important and the work I did was filed away. I found out before the arbitration that no one completed this job

Under the due process clause, what process was due, and denied to me?

A fair trial; double jeapardy (same charges in Nov 1978 and July 1979); A chance

to reply to the investigation report recommending my dismissal; A pre-termination hearing to tell my side of the story; Written notice from the Director when my job performance is unsatisfactory as required under HRS 76-41; Ten days written notice before the effective date of my termination as required by HRS 76-46; Specifics and dates of excessive use of sick leave and unsatisfactory work performance to support the ten day suspension without pay in Nov. 1978 and the dismissal in July 1979; Before my dismissal a meeting with the Finance Director and Civil Service Director as required in the grievance procedure and contract; The opportunity to cross examine Mr. Oka at the trial below; The opportunity to examine and reply to the CPA report and to cross examine the CPA; The specific and dates of the 300 meetings with Mr. Carson; and a meaningful time and place to answer the City's charge of excessive use of sick leave and unsatisfactory work performance (not ten years later).

Pre-termination Hea ring vs. Post-termination hearing.

The arbitrator, district court judge, and 9th circuit said that even if I had a pretermination hearing the results would be the same. In theory at least this is possible. In practice, however it doesn't work because the difference in a pre and post termination hearing is like night and day especially in this case when the post termination hearing on my Title 7 claim took too long-over 12 yea rs. Some court have held that a post termination hearing is no hearing and you cannot simulate the circumstances of a pretermination hearing. This is why some courts have said tha t the remedy for denial of a pretermination hearing is automatic reinstatement. IN a pretermination hearing the employee is still employed and the violations can usually be corrected and the employee can be reta ined. In a post termination hearing, a fired employee is seeking reinstatement which is almost impossible which in my case would mean substantial back pay and damages.

An Explantion of the City's Charge of Unsatisfactory Work Performance

The City's so-called evidence of unsatisfactory work performance is not what it seems because of the way Mr. Oka supervised his subordinates. Generally, he would give you an assignment without supervision and when you completed the work and turned it in to him, he would usually: (1) ask for more information, (2) tell you to do it another way although the way you did it was in accordance with generally acceptable accounting principles and practices but there were also acceptable alternatives, and (3) tell you that you did it wrong. Most of Mr. Oka's complaints of unsatisfactory work performance came under #1 and #2. These are really not complaints of unsatisfactory work performance per se but Mr. Oka's unique way of supervision. Since it was normal for Mr. Oka to return the work turned in by the analyst for revision in accordance with the above, everybody's work was "unsatisfactory."

Supreme Court, U.S.
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(2)

No. 92-674

In The
Supreme Court of the United States
October Term, 1992

EDGAR H. W. LUM,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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42 pp

QUESTIONS PRESENTED

1. Whether Petitioner's claims (a) that he was fired in retaliation for filing a Title VII claim and should therefore be reinstated to his job, (b) that he should be reinstated to his job for violation of his due process rights, and (c) that he was not given a fair trial, should be denied review by this Court since Petitioner failed to raise such issues at the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit")?

2. Whether there was substantial evidence to support the district court's findings of fact regarding Petitioner's Title VII claim?

3. Whether Petitioner's claim that he should be reinstated to his job under section 76-46 of the Hawaii Revised Statutes should be denied review by this Court since such a claim involves interpretation of a state statute, a task more appropriately left to the lower federal courts?

4. Whether the Ninth Circuit correctly ruled that Petitioner is not entitled to relief under section 76-46 of the Hawaii Revised Statutes because both a state arbitrator and the district court found that Petitioner had been terminated for good cause and the result would not have been different even if he had received pretermination notice and a hearing?[1]

---

[1] Should certiorari be granted, Respondent City and County of Honolulu may pose an additional question for review by this Court:

5. Whether, before reaching the merits of Petitioner's claim for relief under section 76-46 of the Hawaii Revised Statutes, the question of the interpretation of such state statute should be certified to the Hawaii Supreme Court in accordance with Rule 13 of the Hawaii Rules of Appellate Procedure?

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No. 92-674

In The
Supreme Court of the United States
October Term, 1992

EDGAR H. W. LUM,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City and County of Honolulu (hereinafter "the City") prays that the petition for review of the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), filed and entered on June 15, 1992, be denied.

OPINIONS BELOW

The following opinions were rendered by the lower courts in this matter:

Lum v. City & County of Honolulu, 690 F. Supp. 914 (D. Haw. 1988) (holding that a state arbitration award, confirmed by a state court, would not have preclusive effect in a federal Title VII action, but that the arbitrator's findings should be given some weight at trial).

Lum v. City & County of Honolulu, 728 F. Supp. 1452 (D. Haw. 1989) (denying the City's motion for reconsideration of an order denying motion for summary judgment, and distinguishing *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, 493 U.S. 817 (1989)).

Lum v. City & County of Honolulu, 732 F. Supp. 1070 (D. Haw. 1990) (dismissing as moot Plaintiff Edgar H.W. Lum's motion for reconsideration of an order granting the City's motion to amend an interlocutory order to include a statement for interlocutory appeal).

Lum v. City & County of Honolulu, 963 F.2d 1167 (9th Cir. 1992) (dismissing in part, affirming in part, and vacating in part the judgment entered by the United States District Court for the District of Hawaii).

JURISDICTION

The Ninth Circuit issued its original decision on March 17, 1992. On or about March 30, 1992, Petitioner filed a petition for rehearing en banc, and, on or about May 26, 1992, he filed an addendum to his petition. On June 15, 1992, the Ninth Circuit filed and entered an amended opinion, which is the subject of this petition for writ of certiorari. *See* Appendix "A."

On or about July 31, 1992, Petitioner filed a tardy second petition for rehearing en banc, and, on or about August 12, 1992, he filed an ex-parte motion to recall the mandate. The Ninth Circuit, on August 31, 1992, denied the motion to recall the mandate and ordered the clerk of the court to "accept no further filings from Mr. Lum regarding this matter." Despite the Ninth Circuit's admonition, on or about September 1, 1992, Petitioner

attempted to file a third petition for rehearing en banc. The City has no knowledge of whether the Ninth Circuit accepted this document for filing.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the Ninth Circuit was conferred by 28 U.S.C. § 1291. The federal district court had federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e-3, and pendent jurisdiction over the state-law claims.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions bearing on Petitioner's due process claim are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment, in relevant part, provides that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The statute governing Petitioner's Title VII claim reads in part as follows:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because

> he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

The statute involved in Petitioner's pendent state-law claim reads as follows:

> **Dismissals; demotions.** An appointing authority may dismiss or demote any employee when the appointing authority considers that the good of the service will be served thereby. Dismissals may be made only for such causes as will promote the efficiency of government service.
>
> No dismissal or demotion of a regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

Haw. Rev. Stat. § 76-46. The corresponding City and County of Honolulu Civil Service Rule states that:

> [W]hen an employee is dismissed or demoted, a written notice setting forth the specific reasons for the dismissal or demotion shall be given the employee at least ten

> calendar days before the effective date of such dismissal or demotion and a copy thereof shall be filed with the Director.

Civ. Service R. 10.3(c).

STATEMENT OF THE CASE

A. Background Facts

Petitioner, a person of Chinese ancestry and a certified public accountant, was employed by the City as an Internal Control Analyst II from March 9, 1967 to July 28, 1979. Petitioner's Appendix (P.A.) at 4a.[2] During his employment with the City, Petitioner was a member of the Hawaii Government Employees Association, Unit 13, and was covered by a collective bargaining agreement entered into between the union and the City. P.A. at 4a-5a.

Between November 1972 and July 1979, Petitioner's work history was replete with instances of poor and insubordinate work performance. In late 1972, supervisor Arlie Carson found Petitioner's report on an equipment inventory project to be "incomplete" and "lack[ing] in depth and detail." P.A. at 5a. In early 1973, E.T. Hara drafted a memorandum requesting that "corrective action" be taken against Petitioner because of his

---

[2] All of the background facts contained in this "Statement of the Case" are derived from the "Decision, Findings of Fact, and Conclusions of Law," rendered by the United States District Court for the District of Hawaii on August 29, 1990. A copy of this document is attached as Appendix "A" of Petitioner's brief.

It should be noted that Petitioner failed to challenge any of these factual findings in the Ninth Circuit, so they should be viewed as conclusive.

"ineptitude and general ineffectiveness" in work performance. *Id.* Less than a month later, Mr. Carson issued a written reprimand to Petitioner, which followed an earlier verbal reprimand, warning that "the next violation of Civil Service Rules could result in suspension or dismissal from employment with the City and County of Honolulu." P.A. at 5a-6a.

During 1975 and 1976, Mr. Carson attempted to relocate Petitioner to another City department because he felt that a different environment might improve Petitioner's attitude towards his work. P.A. at 10a-11a. However, the Department of Transportation and the Honolulu Police Department both refused the possible transfer because of Petitioner's "reputation." P.A. at 11a. The Liquor Commission did agree to accept Petitioner's transfer on the condition that his work grade status would depend upon his work performance. *Id.* Petitioner rejected this proposal. P.A. at 12a. Mr. Carson also arranged for Petitioner to be involved in the Visiting Nurse Program, a program in which a nurse visits the City employee's home during illnesses. *Id.* This effort failed since Petitioner was not at home during the nurses' visits. *Id.* Mr. Carson additionally enrolled Petitioner in the Troubled Employees Program for counseling; it was uncertain what effect this program had on Petitioner. *Id.*

In December of 1976, Alexander Oka wrote to Petitioner, calling his handling of a Liquor Commission audit "inadequate" and providing him with instructions on how to complete the work. P.A. at 6a. Around the same time, Mr. Hara memorialized his impression that Petitioner "had continuously been reminded that he was spending too much time pursuing personal business and grievance matters." *Id.*

On November 27, 1978, Samuel T. Hata, the Director of Finance, informed Petitioner that he was suspended for ten days for excessive use of sick leave, excessive use of work time to accomplish personal business, and malingering. P.A. at 6a-7a. More specifically, it was found that between 1973 and 1978 Petitioner took a total of 264-3/8 days of sick leave, and that, while on sick leave, Petitioner often conducted his own personal business ventures. P.A. at 12a-13a.

Less than one month after Petitioner completed his ten-day suspension, Mr. Carson issued a memorandum expressing disapproval of Petitioner's continued use of work time for personal business and warning that "[f]ailure to commit your entire working time to assigned work will be cause for disciplinary action." P.A. at 8a. Eight days later, Mr. Carson issued a similar memorandum disapproving of Petitioner's work habits and pointing out future consequences. *Id.* About one month later, Mr. Carson repeated his admonition and warning to Petitioner. P.A. at 8a-9a. And on January 30, 1979 and February 5, 1979, Petitioner was again reprimanded for lack of work performance. P.A. at 9a.

According to Mr. Carson, many of the telephone calls Petitioner received in the office during this time period related to his personal business dealings, and Petitioner's involvement in real property litigation was a major contributing factor in his taking of excessive sick leave. P.A. at 10a. Mr. Carson also recalled that Petitioner was warned at least a dozen times that his work was "inadequate." *Id.*

On April 18, 1979, Petitioner received an assignment to "review and evaluate the operational controls of the [Parks Department] Maintenance Support Services

Storeroom and submit recommendations," which assignment should have been completed in 200 hours. P.A. at 15a. Less than a month later, on May 11, 1979, Petitioner filed a discrimination complaint with the Equal Employment Opportunity Commission. *Id.*

After "completing" his Parks Department assignment on June 7, 1979, Petitioner submitted to Mr. Oka a 1-1/2 page report. *Id.* A day later, Mr. Oka expressed disappointment at the report, writing to Petitioner that "you have merely parroted a previous report and did no thinking on your part nor any analysis [sic] on your part [and] that you have spent so much time on this assignment and yet have very little to show for the effort." P.A. at 16a.

Thereafter, Mr. Oka recommended to Mr. Hata that Petitioner be dismissed for "insubordination" in general and for "refusal to do any appreciable work during the week ending Friday, July 6, 1979" in particular. P.A. at 16a-17a. Petitioner responded that he had been confused as to his job assignment and its due date, and commented on the "intolerable working conditions" and his perception that he was "continuously discriminated against and harassed." P.A. at 17a. Mr. Oka then wrote Petitioner a memorandum informing him that his work on the Parks Department project was "unsatisfactory" because of his "admission that [he] made no effort to go to the Parks storeroom to perform the inventory test" and his "working papers show[ed] that little work was done in the office." P.A. at 18a.

The trial court, quoting from the arbitrator's decision, summarized the situation as follows:

> Over [Petitioner's] 12-year employment period, the record shows enumerable attempts by [the City] to counsel, correct and rehabilitate [Petitioner] to acceptable levels of performance and [Petitioner] was afforded manifold opportunities along the way to reverse his downward spiraling work performance record. . . . Where [Mr. Carson] had "tried everything," but found "no hope," the ultimate discharge became inevitable, as most eloquently expressed in [Mr. Carson's] own words:
>
> "... We could see no change in attitude or conduct at all during the 10-year period that he was in, while I was there, in the Department of Finance, and in determining the extent of the punishment, we were at our wit's end to do anything. We just didn't know what else to do.
>
> "We had not been able to affect a resolvement [sic] of the situation no matter how much we'd tried, what we had done. It was the exact same thing as when we'd started, so in light of that, and not even having a glimmer of a hope to resolve the situation, the ultimate thing was to dismiss him, which we did."

P.A. at 20a-21a.

On July 18, 1979, Petitioner received a letter informing him that he was suspended without pay for ten days, with termination to follow. P.A. at 23a. The rea-

sons given for the suspension were "excessive use of sick leave," "inability to perform work assignments," "nonproduction of assigned work," and "attitude toward your job." P.A. at 23a-24a. Although Petitioner did not receive a pretermination hearing, Mr. Carson testified, and the trial court found credible, that "a pretermination hearing would not have changed or altered the suspension/termination decision." P.A. at 24a.

Petitioner subsequently attempted to grieve his termination, but his union refused to take the grievance to arbitration. P.A. at 27a. The Hawaii Public Employment Relations Board, however, agreed with Petitioner and ordered the union to refer the grievance to binding arbitration and to represent Petitioner at the hearing. P.A. at 28a. The arbitration proceeding spanned fifteen days, and the record developed in the proceeding included over 2,600 pages of testimony and 228 separate documentary exhibits. *Id.*

On January 14, 1987, the arbitrator, selected pursuant to the collective bargaining agreement, issued a decision in which he found that the City had legitimate reasons for dismissing Petitioner, the termination was not motivated by discrimination, and the City's action was not in retaliation for any of Petitioner's prior complaints and grievances. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1453. Petitioner thereafter moved the Hawaii Labor Relations Board to vacate the arbitrator's decision. *Id.* The Board dismissed the motion, and the Circuit Court of the First Circuit, State of Hawaii, affirmed the dismissal. *Id.* In the meantime, the state court granted the City's motion to confirm the arbitration award "on the ground that the award had not been vacated or otherwise modified." *Id.*; *see* Haw. Rev. Stat. §

658-8 (the circuit court *shall* confirm an arbitration award unless it is "vacated, modified, or corrected"). Petitioner appealed both arbitration-related rulings to the Hawaii Supreme Court, which issued separate orders denying the appeals. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1454.

B. Proceedings Below

The federal leg of Petitioner's meandering trek through the court system began in 1980, when, after he was terminated from his job as Internal Control Analyst II with the City, Petitioner filed a complaint in the United States District Court for the District of Hawaii in which he alleged violations of civil-rights laws, the due process clause, and the state civil service laws. Federal court jurisdiction was predicated upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e-3. However, "the case was not moved forward because of pending arbitration proceedings" outlined above. *Lum v. City & County of Honolulu*, 690 F. Supp. at 915.

After the arbitrator issued his decision in the union grievance proceeding, the City filed a motion for summary judgment on the "entire claim on the basis that a prior arbitration decision precludes [the federal] action under principles of res judicata and estoppel." *Id.* The district court denied the City's motion, holding that "a state judgment which affirms an arbitration award would not operate to preclude a later Title VII action," *id.*, but "the arbitrator's findings should be given some weight at trial." *Id.* at 916.

The City moved for reconsideration of the district court's order on the strength of the Ninth Circuit's opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th

Cir.), *cert. denied*, 493 U.S. 817 (1989), which held that an arbitrator's decision that is confirmed by a Hawaii state court is a "judicial proceeding" to be given "full faith and credit" and preclusive effect in a later federal proceeding. The court denied the City's motion, and, in the process, distinguished *Caldeira* by finding that, in the instant action, the arbitrator's decision was not given judicial consideration on the merits. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1457. The court also noted that federal statutory and constitutional rights should not be resolved in an arbitral setting. *Id.* at 1459.

Upon receiving the district court's unfavorable legal ruling, the City sought permission to pursue an interlocutory appeal. The court granted the City's request, but the Ninth Circuit declined the invitation to rule on the issue. *See Lum v. City & County of Honolulu*, 732 F. Supp. at 1071.

The case eventually proceeded to trial before Judge Kay on July 19 and 20, 1990. On August 29, 1990, the court issued its "Decision, Findings of Fact, and Conclusions of Law" in which it held that: (1) Petitioner failed to sustain his burden to prove a retaliatory discharge under Title VII, and the City articulated legitimate non-retaliatory reasons for the termination; (2) Petitioner proved his due process rights were violated when he was not given a pretermination hearing and he should be awarded $8,000.00 for his emotional trauma, but he was not entitled to reinstatement since he "failed to prove that he would have been retained had full procedural due process been provided"; and (3) the City complied with section 76-46 of the Hawaii Revised Stat-

utes since Petitioner was given the requisite ten-day notice prior to termination. P.A. at 33a-40a.

Petitioner then filed a notice of appeal to the Ninth Circuit, and the City filed a notice of cross-appeal on the "full faith and credit" issue. The Ninth Circuit dismissed the City's cross-appeal on the ground that "there is no need to review denials of summary judgement after there has been a trial on the merits." *Lum v. City & County of Honolulu*, 963 F.2d at 1170. It affirmed the award of $8,000.00 for Petitioner's emotional distress occasioned by the violation of his procedural due process rights. *Id.* And it vacated as moot the district court's ruling that section 76-46 had not been violated, since "both the arbitrator and the district court concluded that [Petitioner] was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing." *Id.* at 1171.

REASONS FOR DENYING THE WRIT

The instant petition should be denied because the issues raised therein were not preserved at the Ninth Circuit and deference should be paid to the district court's interpretation of the state civil service statute. Moreover, the district court's consideration of the evidence and its weighing of the credibility of witnesses should be respected. Indeed, Petitioner has failed to set forth any procedurally cognizable reason, let alone any "special and important reason," for this Court to grant his petition.

A. Petitioner's Title VII, Due Process, and Unfair Trial Claims Should Be Denied Review Because Petitioner Failed to Preserve His Objections Regarding Said Claims at the Ninth Circuit; Moreover, the Undisputed Factual Findings Support the District Court's Actions and Rulings on Said Claims

This Court has previously declared that failure to raise an issue in the court of appeals may preclude the raising of the issue for the first time on certiorari. *Demarest v. Manspeaker*, 498 U.S. 184, ___, 111 S. Ct. 599, 603 (1991); *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 551 n.3 (1990). It cannot be disputed that Petitioner did not challenge the fairness of the trial or the district court's rulings on his Title VII and due process claims. The scope of the Ninth Circuit's review, as specified by the court itself, was limited to the following issues:

> The plaintiff appeals the district court's finding that his termination was not in violation of Hawaii Revised Statutes ("HRS") § 76-46. The defendant cross-appeals the denial of its motion for summary judgement on the Title VII claims and the amount of damages awarded to the plaintiff for the violation of his due process rights resulting from the denial of a pretermination hearing.

Lum v. City & County of Honolulu, 963 F.2d at 1168. In fact, even Petitioner acknowledges in his petition that his Ninth Circuit appeal did not touch upon the issues he now seeks to raise. Petitioner recounted in his brief that he, "thru [sic] his new attorney, Evan Shirley, appealed on the

violation of HRS 76-46 only on Sept. 24, 1990." Petitioner's Brief at 6 (emphasis added).

Having failed to challenge the district court's rulings on his claims for relief under Title VII and the due process clause and having omitted a challenge to the fairness of his trial in the Ninth Circuit, Petitioner should not be allowed to seek review on certiorari. His petition therefore should be denied on the ground that it is procedurally infirm.

Moreover, even a cursory review of the district court's findings, conclusions, and decision tells of the court's thoroughness and fairness toward the litigants. With respect to Petitioner's Title VII claim, the district court detailed incident after incident, from 1972 to 1979, where Petitioner was found to be "inept," "ineffective," guilty of "insubordination," and abusive of sick-leave privileges, and his work was deemed "incomplete," "lacking," and "inadequate." *See* Statement of the Case, *supra*. At no time during the appellate process has Petitioner contested the accuracy of the district court's findings regarding his work performance, and he offers no meaningful challenge to them now. Clearly, then, the district court justifiably found with respect to the Title VII claim that:

> Plaintiff's extended career with the City and County was marred by ineffective work performance, abuse of sick leave privileges, and a poor work attitude. The event which constituted the "last straw" for the City and County concerned Lum's performance of an assignment at the Parks Storeroom. Plaintiff's work on the assignment was inadequate. When given an

> opportunity to complete the assignment properly Plaintiff failed to follow his supervisor's instructions. Accordingly, Plaintiff was given ten-days notice of his termination.
>
> After extensive hearings and an arbitration proceeding this case finally came to trial before this Court. Based on the overwhelming evidence presented in this case this Court finds that Plaintiff's retaliatory discharge claims are not supported. Even assuming Plaintiff made a prima facie case of retaliation, Defendant established legitimate non-retaliatory grounds for discharge which Plaintiff has failed to show were pretextual.

P.A. at 1a-2a. If this Court were to view all the trial evidence, it too would be left with the firm conviction that the district court's findings are supported by substantial, even overwhelming, evidence. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).[3]

On the due process issue, the district court ruled in favor of Petitioner, finding that the City failed to provide a pretermination hearing as required by law. P.A. at 37a. The court also determined that Petitioner sus-

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[3] Moreover, this Court has stated that it will not "ordinarily grant certiorari to review judgments based solely on questions of fact," *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 298 (1940), and that it will "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

tained emotional distress damages of $8,000.00, which were causally connected to the City's omission. P.A. at 39a. But the court concluded that Petitioner "failed to prove that he would have been retained had full procedural due process been provided. Accordingly, Mr. Lum is not entitled to reinstatement." P.A. at 38a.

The district court's decision denying Petitioner's prayer for reinstatement was well-grounded in law. It is well-nigh axiomatic that a claimant is not entitled to substantial relief unless he can establish that the actionable wrong caused his damages. Hence, this Court has recognized that relief beyond nominal damages will not be given unless the claimant can prove that his fate would have been altered if procedural due process had been followed.[4]

The court's denial of reinstatement is also factually sound. The court found credible Arlie Carson's trial testimony that he had read Petitioner's written explanation of the Parks Department assignment and that "a pretermination hearing would not have changed or altered the suspension/termination decision." P.A. at 24a. Petitioner has not challenged this factual finding, and he

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[4] *See Zinermon v. Burch*, 494 U.S. 113, 134 n.19 (1990) (A claimant admitted as a voluntary mental patient "might be entitled to actual damages, beyond the nominal damages awarded for a procedural due process violation unaccompanied by any actual injury, . . . if he can show . . . that if the proper procedure had been followed he would have remained at liberty and that he suffered harm by being confined[.]); *Carey v. Piphus*, 435 U.S. 247, 261 n.16 (1978) (Students cannot recover substantial damages for suspensions unless they show they still would have been suspended even if a proper hearing had been held.).

has not adduced any facts in rebuttal. Indeed, given the nearly seven-year history of poor work performance, the district court was justified in finding and concluding that a pretermination hearing would not have influenced the City's decision and Petitioner's fate. Therefore, the district court properly refused to reinstate Petitioner to his position.

Regarding Petitioner's claim that he was not given a fair trial, the City would make four observations. First, it is noteworthy that Petitioner's trial counsel did not object to the state arbitrator's and trial judge's fairness, competence, and impartiality. Second, appellate counsel did not complain to the Ninth Circuit about any unfairness in the arbitration and trial proceedings. Third, the district court issued specific findings rejecting Petitioner's averment that the union attorney did not properly represent him during the arbitration. The court found that the union attorney "adequately represented" Petitioner and that complaints of a strained attorney-client relationship were "overshadowed by the arbitrator's finding that the issues were bitterly contested." P.A. at 29a. These findings have not been and still are not contested. Fourth, Petitioner can point to no objective indicia of impartiality, such as would warrant the recusal or disqualification of the arbitrator and trial judge. Thus, Petitioner's claim of unfairness in the judicial process, like his other claims mentioned above, should not be considered by this Court.

B. Petitioner's Claim Based Upon Section 76-46 of the Hawaii Revised Statutes Should Be Denied Review Because the Task of Interpreting the State Statute Should Be Left to the District Court, and the Ninth Circuit Properly Held that, Even if the City Violated the Statute, Petitioner Is Not Entitled to Further Relief

With respect to Petitioner's claim for relief under section 76-46 of the Hawaii Revised Statutes, the trial court found that the City did give Petitioner the requisite ten-day pretermination notice. P.A. at 39a. It also concluded, from a plain reading of the statute, that "[t]he fact that for the ten days preceding his termination date Mr. Lum was suspended without pay is of no legal significance and does not affect the validity of the notice." P.A. at 39a-40a.

The district court's factual finding should be left intact since Petitioner has made no effort to show, nor can he show, that it was "clearly erroneous." *See United States v. United States Gypsum Co.*, 333 U.S. at 395. Petitioner's plea for review of the district court's construction and application of section 76-46 should be denied as prudentially improper since, normally, this Court "defer[s] to the construction of a state statute given it by the lower federal courts." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985). This Court exercises deference in part because of its belief "that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Id.* at 500.

Furthermore, the Ninth Circuit was correct in ruling that "[e]ven if the City violated § 76-46, it does not follow that Mr. Lum is entitled to additional relief." *Lum v. City & County of Honolulu*, 963 F.2d at 1171. The purposes of both the statute and the due process clause are identical—to furnish notice to the employee, to give him an opportunity to respond to the employer's charges, and to provide a hearing on the charges. *Bugbee v. Kimmich*, 42 Haw. 122, 124-25 (1957). That Petitioner already recovered $8,000.00 to compensate him for his emotional trauma arising out of the City's failure to protect his due process rights cannot be denied. Nor can it be denied that the district court rejected reinstatement as a remedy for the due process violation because of Petitioner's inability to prove that a pretermination hearing would have altered the City's decision.

Given the coinciding purposes of the statute and the due process clause, and the fact that Petitioner already received compensation for the violation of the latter, the Ninth Circuit was right in holding that Petitioner "is not entitled to additional relief under state law." *Lum v. City & County of Honolulu*, 963 F.2d at 1171.

Thus, review of the Ninth Circuit's decision on the section 76-46 claim should be denied because the district court's legal construction should be respected and the Ninth Circuit's opinion was proper.

CONCLUSION

For the foregoing reasons, Respondent City and County of Honolulu respectfully requests that the petition for writ of certiorari be denied.

Dated: Honolulu, Hawaii, November 10, 1992.

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APPENDIX

APPENDIX "A"
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR H.W. LUM, *Plaintiff-Appellant,*	No. 90-16452
v.	D.C. No. CV-80-00384-ACK
CITY AND COUNTY OF HONOLULU, *Defendant-Appellee.*	
EDGAR W.H. LUM, *Plaintiff-Appellee,*	No. 90-16732
v.	D.C. No. CV-80-00384-ACK
CITY AND COUNTY OF HONOLULU, *Defendant-Appellant.*	ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
February 12, 1992 — San Francisco, California

Filed March 17, 1992
Amended June 15, 1992

Before: Alfred T. Goodwin, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Appeals/Employment Discrimination

The court of appeals affirmed in part and reversed in part a district judgment and dismissed in part an appeal from the judgment. The court held there is no need to review denials of summary judgment after there has been a trial on the merits.

Appellant Edgar Lum was dismissed from his job with appellee the City and County of Honolulu. Lum filed suit, alleging violations of Title VII, due process rights, and a state statute. The City claimed he was fired for good cause. The federal suit was stayed pending resolution of a grievance filed under an agreement between Lum's union and the City. Eventually, seven years after he was terminated, arbitration hearings were held, and it was determined that he was filed for misconduct, not for the reasons he alleged. A state labor relations board dismissed a motion to vacate. Lum appealed the dismissal to a state court. The court affirmed. Later the state court granted a motion to confirm the arbitration decision. The City moved for summary judgment. The motion was denied because appeals were still pending. It was renewed and denied a second time. A two-day bench trial was held in district court. The court determined that Lum was fired for legitimate cause. The court also held, however, that failure to provide him a pretermination hearing violated his due process rights; the court awarded damages and attorneys' fees. Finally, the court held the City had not violated the state statute. Lum appealed, and the City cross-appealed.

[1] The appropriate forum to review denial of a summary judgment motion is through interlocutory ap-

peal. There is no need to review denials of summary judgment after there has been a trial on the merits.

[2] The district court's award of damages to Lum was not extreme or outrageous on its face, and no reason was presented that the amount was not appropriately discounted. The court's findings were not clearly erroneous.

[3] Even if the City violated the state statute, it does not follow that Lum was entitled to additional relief. Both the arbitrator and the district court concluded he was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing.

COUNSEL

Evan R. Shirley, Honolulu, Hawaii, for the plaintiff-appellant.

Rodney Veary, Deputy Corporation Counsel, City and County of Honolulu, Honolulu, Hawaii, for the defendant-appellee.

ORDER

In reviewing the case, our attention has been called to the cross appeal's contention that even after prevailing in a trial on the merits, the city was entitled to have an advisory opinion on the question whether the trial court had erred in denying the city's motion for summary judgment. We declined to review the trial court's ruling, citing *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987). Slip Op. 2669 at 2674.

The opinion filed March 17, 1992, is amended by adding a footnote signal at the end of the last paragraph

on page 2674, with the footnote to read as follows: In *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366 (9th Cir. 1990), reversing a judgment entered after a trial, we held that a proper reading of the law of Virginia would have excluded the parole evidence introduced at trial to vary the terms and conditions of an integrated written contract and summary judgment should have been given for the plaintiff. While the opinion did not cite *Locricchio*, the cases are not inconsistent. *Wilson Arlington* was about the parol evidence rule, and did not consider or discuss the reviewability *vel non* of the denial of summary judgment after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parol evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in *Locricchio*, where we said "the majority rule appears to be that the denial is not properly reviewable on an appeal from the final judgment entered after trial." In a footnote, we said "*see Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975)" We went on to point out that because the challenged judgment in Hilton had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appealability of the denial of summary judgment, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgment upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in *Sakamoto v. Duty Free Shoppers, LTD.*, 764 F.2d 1285, at 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing. Judges Farris and Poole have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

OPINION

GOODWIN, Circuit Judge:

In 1979 the defendant, City and County of Honolulu ("City"), fired the plaintiff from his position as an accountant. The plaintiff appeals the district court's finding that his termination was not in violation of Hawaii Revised Statute ("HRS") § 76-46. The defendant cross-appeals the denial of its motion for summary judgement on the Title VII claims and the amount of

damages awarded to the plaintiff for the violation of his due process rights resulting from the denial of a pretermination hearing.

The district court had federal question jurisdiction over Lum's Title VII, and due process claims under 28 U.S.C. §§ 1331, 1337, and 1343, and 42 U.S.C. § 2000e-(f)(3). The court had pendent jurisdiction over the state law claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291. Notices of appeal were timely filed. Fed. R. App. P. 4(a).

I.

Mr. Lum had been an employee with the City of Honolulu for twelve years when, in 1979, he was dismissed from his job as an "Internal Control Analyst." Lum filed suit against the City alleging violations of Title VII of the Civil Rights Act of 1964, due process, and HRS § 76-46. Plaintiff claimed that his dismissal was based on race discrimination and was in retaliation for filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). The City claimed that Lum was fired for ineffective work performance, abuse of sick leave, and a poor work attitude. Plaintiff also challenged the manner in which he was discharged.

The federal suit was stayed pending resolution of Lum's grievance under the collective bargaining agreement between Lum's union, the Hawaii Government Employees Association, and the City. The grievance process went through three stages at which point the union refused to represent Lum in arbitration. After a separate, lengthy battle, Lum prevailed in his fight with the union and the matter was slated for arbitration. In early 1986, almost seven years after the termination, arbitration

hearings were held and on January 27, 1987 a decision was filed concluding that the plaintiff had been fired for misconduct and that the discharge was not motivated out of racial discrimination or in retaliation for his filling a claim with the EEOC.

Lum filed a motion before the Hawaii Labor Relations Board to vacate the arbitration decision. The Board dismissed the motion because it lacked the authority to vacate an arbitration award. An arbitration decision can be challenged only in Hawaii Circuit Court pursuant to HRS Chapter 658. Rather than attacking the arbitration decision under Chapter 658, Lum appealed the Board's dismissal of his motion to the Hawaii Circuit Court. The Board's decision to dismiss his motion was affirmed by both the Circuit Court and the Hawaii Supreme Court. Meanwhile, the City moved in Circuit Court to "confirm" the arbitration award pursuant to HRS § 658-8. The motion was granted on the grounds that the arbitration award had not been vacated or otherwise modified. Lum appealed this grant to the Hawaii Supreme Court which again ruled against him.

On June 3, 1988 the City moved for summary judgement in the present action on the Title VII claim arguing that the arbitrator's decision should be given preclusive effect. The motion was denied, in part, because appeals were still pending in state court. *See Lum v. City and County of Honolulu*, 690 F.Supp. 914 (D.Haw. 1988) (Lum I). The Motion was renewed on March 23, 1989 after all state appeals had become final. For a second time it was denied. *See Lum v. City and County of Honolulu*, 728 F.Supp. 1452 (D.Haw. 1989) *(Lum II)*. The district court granted the City's motion to certify the denial of summary judgement for interlocutory appeal

pursuant to 28 U.S.C. § 1292(b). We did not permit the appeal to be taken.

After a two day bench trial, the district court ruled for the City on the Title VII claims, finding that the City had legitimate cause to fire Mr. Lum. The court held, however, that the City's failure to afford Mr. Lum a pretermination hearing violated his due process rights and awarded the plaintiff actual damages in the amount of $8,000 and attorneys' fees with respect to that issue. Finally, the court ruled that the City had not violated HRS § 76-46.

II.

On cross-appeal the City asks us to reverse the district court's denial of its motion for summary judgement on the Title VII claims. The City argues that the district court's decisions are inconsistent with our opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, 493 U.S. 817 (1989). While the City was denied summary judgement, it was awarded judgement on the Title VII claim after a trial on the merits.

In *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1858-59 (9th Cir. 1987), we refused to review the denial of a summary judgement motion by a party who had suffered an adverse judgement on the merits. "We hold, therefore, that the denial of a motion for summary judgement is not reviewable on an appeal from a final judgment entered after a full trial on the merits." *Id.*

Locricchio is somewhat at odds with our earlier opinion in *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975). Mumaw was denied summary judgement but received a directed verdict. Hilton appealed from the

directed verdict while Mumaw cross-appealed from the denial of summary judgement. Without specifically addressing the issue of reviewability, we entertained the cross-appeal. "[A]s to issues upon which we reverse the directed verdict, we affirm the denial of summary judgment. As to issues upon which we affirm the directed verdict, we dismiss the cross appeal as moot." *Id.* We reasoned in *Locricchio* that we were not bound by *Hilton* because the decision did not address the issue of reviewability.

[1] The appropriate forum to review the denial of a summary judgement motion is through interlocutory appeal under 28 U.S.C. § 1292(b). The defendant's efforts to seek interlocutory appeal were unsuccessful. We follow the teaching of *Locricchio* and hold that there is no need to review denials of summary judgement after there has been a trial on the merits. Such a review is a pointless academic exercise. The City's cross-appeal of the denial of the summary judgement motion is dismissed.[1]

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[1] In *Wilson Arlington Co. v. Prudential Ins Co.*, 912 F.2d 366 (9th Cir. 1990), reversing a judgment entered after a trial, we held that a proper reading of the law of Virginia would have excluded the parole evidence introduced at trial to vary the terms and conditions of an integrated written contract and summary judgment should have been given for the plaintiff. While the opinion did not cite *Locricchio*, the cases are not inconsistent. *Wilson Arlington* was about the parol evidence rule, and did not consider or discuss the reviewability *vel non* of the denial of summary judgment after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parol evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in *Locricchio*, where we said "the majority rule appears to

III.

The district court awarded Lum partial summary judgement on the due process claim. The court found that Lum had a property interest in continued employment and was entitled to due process, including adequate notice of the charges and an opportunity to be heard, prior to termination. The court held that the City violated these rights when it terminated the plaintiff without a pretermination hearing. The City does appeal the award of $8,000 in actual damages.

The computation of damages is a finding of fact that is reviewed under the clearly erroneous standard.

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be that the denial is not properly reviewable on an appeal from the final judgment entered after trial." In a footnote, we said "*see Hilton v. Mumaw*, 552 F.2d 588, 603 (9th Cir. 1975)" We went on to point out that because the challenged judgment in *Hilton* had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appealability of the denial of summary judgment, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgment upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in *Sakamoto v. Duty Free Shoppers, LTD.*, 764 F.2d 1285, at 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

Galindo v. Stoody Co., 793 F.2d 1502, 1516 (9th Cir. 1986). The district court concluded that "[a]lthough the causal link between the City and County's actions is questionable this court concludes that there was sufficient probative evidence of some embarrassment and humiliation by Mr. Lum caused by the denial of a pretermination hearing to justify an award of $8,000."

[2] On appeal, the City challenges the evidence but fails to establish that the district court ignored relevant factors in calculating the award. The award is not extreme or outrageous on its face. No reason is presented to suggest that the amount of damages was not appropriately discounted. We hold that the district court's findings were not clearly erroneous and affirm the award.

IV.

Hawaii law mandates that certain steps be taken before an employee in Mr. Lum's position can be fired. The relevant statute provides:

> No dismissal or demotion of any regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

HRS § 76-46. The corresponding Civil Service Rule states:

> When an employee is dismissed or demoted, a written notice setting forth the specific reasons for the dismissal or demo-

> tion shall be given to the employee at least ten calendar days before the effective date of such dismissal or demotion and a copy thereof shall be filed with the Director.

Civil Service Rule 10.3(c).

Mr. Lum was handed a letter stating that he was being suspended for ten days without pay at the end of which period he would be discharged. The district court held the City's actions did not violate § 76-46 and that the ten day suspension without pay was "of no legal significance." A district court's construction of state law is reviewed de novo. *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987).

The statutory language and the state case law do not provide a clear indication whether the Hawaii Supreme Court would find that a ten day suspension without pay prior to termination would violate § 76-46. Courts in other jurisdiction have held that similar practices violate federal due process. *See Thurston v. Dekle*, 531 F.2d 1264, 1272 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978), *relevant portions reinstated* 578 F.2d 1167 (5th Cir. 1978); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243-44 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987).

[3] Even if the City violated § 76-46, it does not follow that Mr. Lum is entitled to additional relief. He was awarded $8,000 for essentially the same claim brought as a federal action. In holding that the termination of a teacher violated HRS § 297-12, a provision similar to § 76-46, the Hawaii Supreme Court addressed the issue of remedy.

> With respect to plaintiff's request for a declaration that Shorba is entitled to reinstatement to his former position with back pay, we hold that Shorba is not entitled to such relief at this time, that he remains on suspension without pay pending the hearing; and that in the event that the hearing results in his favor, he will then be entitled to resume his former position with back pay.

Shorba v. Shiro Amioka, 54 Haw. 43, 501 P.2d 807, 813 (1972). Lum has received two extensive post termination hearings and both the arbitrator and the district court concluded that he was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing. On these facts we hold that the plaintiff is not entitled to additional relief under state law.

Because the plaintiff is not entitled to further relief, we need not decide whether the City's actions violated § 76-46. The district court's finding that there had been no violation of § 76-46 is vacated, as it was not necessary to the decision of the case. We express no opinion on that issue because it is moot.

DISMISSED IN PART, AFFIRMED IN PART, AND VACATED IN PART.